

(22,235.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 614.

THE SAC AND FOX INDIANS OF THE MISSISSIPPI IN
IOWA, APPELLANTS,

vs.

THE SAC AND FOX INDIANS OF THE MISSISSIPPI IN
OKLAHOMA AND THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

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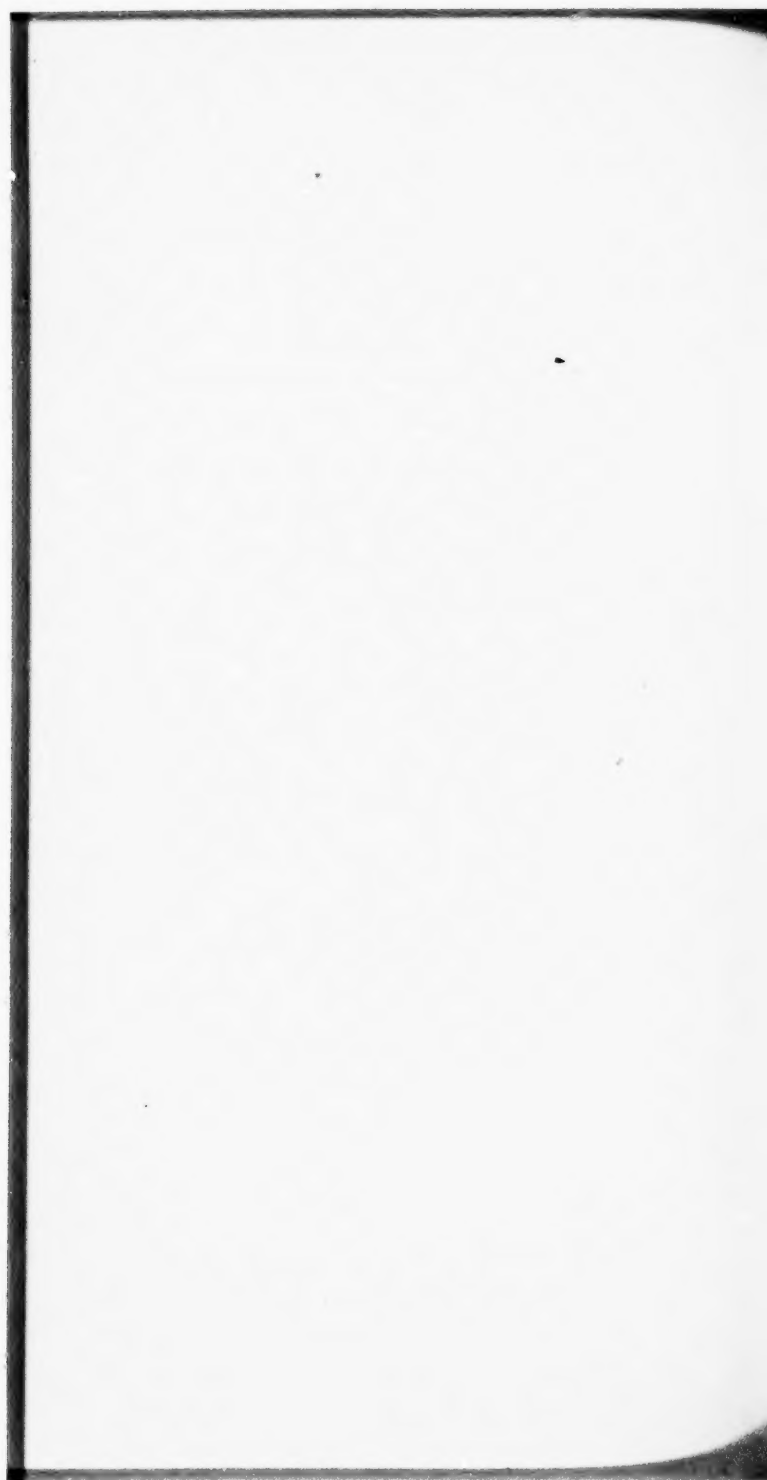
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1 Court of Claims.

No. 29994.

THE SAC AND FOX INDIANS OF THE MISSISSIPPI IN IOWA, Claimants,
vs.
THE SAC AND FOX INDIANS OF THE MISSISSIPPI IN OKLAHOMA, and
THE UNITED STATES, Defendants.

I. *Petition and Amended Petition.*

On the 11th day of April, 1907 the claimants filed their original petition.

Subsequently, to wit: on the 25th day of May 1907, the claimants by leave of Court, in lieu of said original petition, filed *his* amended petition, which is as follows:

2 *Amended Petition.*

(Filed May 25, 1907.)

To the Honorable the Chief Justice and the Associate Justice of the Court of Claims:

Your petitioners, The Sac and Fox Indians of the Mississippi in Iowa, the parties owning and interested in the claims hereby sued upon, are members of the confederated tribes of the Sac and Fox Indians of the Mississippi, and have always been so recognized; that one part of said confederated tribes of the Sac and Fox Indians of the Mississippi, your petitioners, now reside, and have so resided since about 1855, in the State of Iowa, and they comprise the Fox Indians of said confederated tribes; that the other part of said confederated tribes, the defendant Indians in this cause, resided in Kansas until their removal to their present residence in Oklahoma under the treaty of 1867, and that they comprise the Sac Indians of said confederated tribes; that the name of the latter is sometimes written "Sauk," "Sock," or "Sack;" that for the sake of brevity the claimant Indians will hereinafter be designated as the claimant Indians, the Sac and Fox Indians in Iowa, or the Iowa branch of the tribes; and the defendant Indians as the defendant Indians, the Sac and Fox Indians in Oklahoma, or the Oklahoma branch of the tribes, as occasion may require.

3 II.

The Jurisdiction of the Court over the Claims.

The following act of Congress, approved March 1, 1907 (Public, No. 159) confers upon the Court of Claims full jurisdiction, legal

and equitable, without regard to lapse of time, to adjudicate the claims as justice and equity require:

"An Act to authorize the Court of Claims to hear, determine, and adjudicate the claims of the Sac and Fox Indians of the Mississippi in Iowa, against the Sac and Fox Indians of the Mississippi in Oklahoma, and the United States, and for other purposes.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That full legal and equitable jurisdiction, without regard to lapse of time, is hereby conferred upon the Court of Claims to hear, determine, and adjudicate, as justice and equity shall require, with right of appeal to the Supreme Court of the United States by any party in interest, all claims of the Sac and Fox Indians of the Mississippi in Iowa, against the Sac and Fox Indians of the Mississippi in Oklahoma, and the United States for Money claimed to be due to them as their proportionate shares, according to their numbers, and not heretofore paid to or expended for them, of the appropriations made by Congress for fulfilling treaty stipulations with the confederated tribes of the Sac and Fox Indians of the Mississippi, or arising from the disposal or sale of lands of said confederated tribes, or otherwise, including

4 *the claims set out in the Senate Document Numbered Sixty-four, Fifty-seventh Congress, first session, for which suit may be instituted in the Court of Claims within ninety days after the passage of this act by petition signed by the principal chief of said Sac and Fox Indians in Iowa, or by the attorney employed by the proper authorities of said Indians; the compensation to be paid to their said attorney by the Sac and Fox Indians of the Mississippi in Iowa, for his services and expenses rendered and to be rendered in the prosecution of said claims, shall be fixed by the Court of Claims on the termination of said suit. The Attorney-General shall appear and defend in said suit, so far as the United States may be concerned. The Sac and Fox Indians in Oklahoma may appear, by counsel employed by their proper authorities, to defend on their behalf. Said suit on motion of either of the parties thereto, shall be advanced on the dockets of either of said courts and be determined at the earliest date practicable. The reports made to Congress on any of said claims by any department of the Government and printed as congressional documents shall be received as evidence in said suit, so far as the facts therein may be concerned, and shall be given such weight as the court may determine for them.*

"Approved, March 1, 1907."

III.

Your petitioners allege and state that no part of the annuities or other moneys appropriated by Congress in fulfillment of the treaties with the confederated tribes of the Sac and Fox Indians of the Mississippi, or otherwise enumerated to said tribes under the treaties and laws applicable to them, were apportioned or paid to or expended for them by the United States during the period from 1855 to 1866,

both inclusive, and that during said period they received no money, support, or benefits of any kind from the United States.

That from the beginning of 1867 to the present time they have not had apportioned or paid to or expended for them their proportionate shares, according to their numbers, of the annuities and other moneys for said period by the United States.

That during both of the aforesaid periods the annuity due and payable to the principal chief of the Fox Indians of said tribes under the treaty of 1842 was not paid to said principal chief for the years that he has resided among the claimant Indians in Iowa, until such payment was resumed to him in 1900 and subsequently, under express legislative directions, to be hereinafter set out.

That your petitioners have sought for many years past to secure the adjustment of their claims for the annuities and moneys so withheld from them in and by the executive branch of the Government, as will be more fully shown by and in the following congressional documents, which are referred to and will be filed as evidence in this cause so far as the facts in them contained are concerned:

Senate Executive Document No. 172, 51st Congress, 1st session.

Senate Report No. 690, 52d Congress, 1st session.

Senate Mis. Doc. No. 48, 53d Congress, 3d session.

Senate Doc. No. 167, 54th Congress, 1st session.

H. R. Doc. No. 569, 56th Congress, 1st session.

H. R. Doc. No. 38, 57th Congress, 1st session.

Senate Doc. No. 64, 57th Congress, 2d session.

H. R. Report No. 3022, 59th Congress, 1st session.

Senate Report No. 3621, 59th Congress, 1st session.

H. R. bill 10133, 59th Congress, 1st session.

Senate Report No. 7253, 59th Congress, 2d session.

Your petitioners further represent that their claim for their proportionate shares of the money accruing to the said confederated tribes of Sac and Fox Indians of the Mississippi from disposal of land of said tribes under the treaty of 1859 has not heretofore been presented for the consideration of any branch of the Government of the United States, but the same, as shall be hereinafter set out, is presented for adjudication by this court under the jurisdictional act, hereinbefore set out. Attention is, however, invited to the fact that the Secretary of the Interior, in reporting upon certain other claims of your petitioners to Congress, as required by the act of March 2, 1895 (28 Stat., 903), informed Congress that "there is nothing found due under the provisions of the treaty of 1859" (Senate Doc. No. 167, 54th Congress, 1st session). That statement refers to the rights of the claimant Indians in and to the money arising from disposal of the tribal lands under said treaty of 1859.

IV.

Provisions of Treaties Providing Annuities, etc.

That the provisions of the treaties providing for the payment of annuities, moneys, and benefits to said confederated tribes of Sac and

Fox Indians of the Mississippi, and for which Congress has regularly made the required appropriations since the beginning of 1855, or which have accrued to said tribes from the sale or disposal of lands belonging to said tribes, under treaty, are as follows:

"ART. 3. In consideration of the cession and relinquishment of land made in the preceding article, the United States will deliver to the said tribes * * * yearly and every year goods suitable to the circumstances of the Indians of the value of one thousand dollars, (six hundred of which are intended for the Sacs and four hundred for the Foxes) * * *."

(Treaty of 1804, 7 Stat., 84; Kappler, Treaties, 74.)

"ARTICLE III. In consideration of the great extent of the foregoing cession, the United States stipulate and agree to pay to the said confederated tribes, annually, for thirty successive years, the first payment to be made in September of the next year, the sum of twenty thousand dollars in specie.

"ARTICLE IV. It is further agreed that the United States shall establish and maintain within the limits, and for the use and benefit of the Sacs and Foxes, for the period of thirty years, one additional black and gun smith shop, the necessary tools, iron and steel, and finally make a yearly allowance for the same period, to the said tribes, of forty kegs of tobacco, and forty barrels of salt, to be delivered at the mouth of the Ioway river."

(Treaty of 1832, 7 Stat., 374; Kappler, Treaties, 349.)

"ARTICLE 2D. * * *

"*Eighth.* To invest the sum of two hundred thousand dollars (\$200,000) in safe State stocks, and to guarantee to the Indians an annual income of not less than five per cent., the said interest to be paid to them each year, in the manner annuities are paid, at such time and place, and in money or goods as the tribe may direct. * * *

"*Provided,* That it may be competent for the President to direct that a portion of the same may, with the consent of the Indians, be applied to education, or other purposes calculated to improve them."

(Treaty of 1837, 7 Stat., 540; Kappler, Treaties, 495.)

"ARTICLE II. In consideration of the cession contained in the preceding article, the United States agree to pay annually to the Sacs and Foxes, an interest of five per centum upon the sum of eight hundred thousand dollars, * * * and the United States also agree * * * *Second,* * * * and will establish and maintain two blacksmiths' and two gunsmiths' shops convenient to their agency, and will employ two blacksmiths and two gunsmiths to carry on the said shops for the benefit of the Sacs and Foxes; one blacksmith and one gunsmiths' shop to be employed exclusively for the Sacs and one each to be employed exclusively for the Foxes, and all expenses attending the removal of the tools, iron and steel, and the erection of new shops, and the purchase of iron and steel, and the support and maintenance of the shops, and wages of the smiths and their assistants, are to be paid by the tribe, except such portion thereof as they are entitled to have paid by the United States, under 4th article of

the treaty made with them on the 4th of August, 1824, and the 4th article of the treaty of the 21st of September, 1832. And when the said tribes shall remove to the land to be assigned them by the President of the United States, under the provisions of this treaty, the smiths' shops above stipulated for shall be re-established and maintained at their new residence, upon the same terms and conditions as are above provided for their removal and establishment west of the north and south line mentioned in the first article of this treaty.

"ARTICLE IV. It is agreed that each of the principal chiefs of the Sacs and Foxes, shall hereafter receive the sum of five hundred dollars annually, out of the annuities payable to the tribe, to be used and expended by them for such purposes as they may think proper, with the approbation of their agent.

"ARTICLE V. It is further agreed that there shall be a fund amounting to thirty thousand dollars retained at each annual payment to the Sacs and Foxes, in the hands of the agent appointed by the President for their tribe, to be expended by the chiefs, with the approbation of the agent, for national and charitable purposes among their people; such as the support of their poor, burying their dead, employing physicians for the sick, procuring provisions for their people in cases of necessity, and such other purposes of general utility as the chiefs may think proper, and the agent approve. And if at any payment of the annuities of the tribe, a balance of the fund so retained from the preceding year, shall remain unexpended, only so much shall be retained in addition as will make up the sum of thirty thousand dollars."

(Treaty of 1842, 7 Stat., 596; Kappler, Treaties, 546.)

"ARTICLE 1. The Sacs and Foxes of the Mississippi having now more lands than are necessary for their occupancy and use, and being desirous of promoting settled habits of industry and enterprise amongst themselves by abolishing the tenure in common by which they now hold their lands, and by assigning limited quantities thereof, in severalty, to the individual members of the tribe, to be cultivated and improved for their individual use and benefit, it is hereby agreed and stipulated that the portion of their present reservation contained within the following boundaries (boundary descriptions omitted), estimated to contain about one hundred and fifty-three thousand and six hundred acres—shall be set apart and retained for them for the purposes aforesaid.

"ARTICLE 4. For the purpose of establishing the Sacs and Foxes of the Mississippi comfortably upon the lands to be assigned to them in severalty, by building them houses, and by furnishing them with agricultural implements, stock-animals, and other necessary aid and facilities for commencing agricultural pursuits under favorable circumstances, the lands embraced in that portion of their present reservation, not stipulated to be divided as aforesaid, shall be sold under the direction of the Secretary of the Interior, in parcels not exceeding one hundred and sixty acres each, and to the highest bidder, for cash; the sale to be made upon sealed proposals, to be duly invited by public advertisement, and the proceeds thereof

to be expended for the purposes herein-before recited, in such manner as the Secretary of the Interior may think proper. And if any of the tracts so to be sold have upon them improvements of any kind which were made by or for the Indians, or for Government purposes, the proposals therefor must state the price for both the land and the improvements. And if, after assigning to all the members of the tribe entitled thereto their proportion of land in severalty, there shall remain a surplus of that portion of the reservation retained for that purpose, outside of the exterior boundaries of the lands assigned in severalty, the Secretary of the Interior shall be authorized and empowered, whenever he shall think proper, to cause such surplus to be sold in the same manner as the other lands to be so disposed of, and to apply the proceeds of such sale to the purposes and in the mode hereinbefore provided with respect to that portion of their present reservation not retained for distribution.

"ARTICLE 6. * * * And, in order to render unnecessary any further treaty engagements or arrangements hereafter with the United States, it is hereby agreed and stipulated that the President, with the assent of Congress, shall have full power to modify or change any of the provisions of former treaties with the Sacs and Foxes of the Mississippi in such manner and to whatever extent he may judge to be necessary and expedient for their welfare and best interests."

"ARTICLE VII. The Sacs and Foxes of the Mississippi, parties to this agreement, are anxious that all the members of their
10 tribe shall participate in the advantages herein provided for respecting their improvement and civilization, and to that end to induce all that are now separated to rejoin and reunite with them. It is therefore agreed that, as soon as practicable, the Commissioner of Indian Affairs shall cause the necessary proceedings to be adopted to have them notified of this agreement and its advantages, and to induce them to come in and unite with their brethren; and to enable them to do so, and to sustain themselves for a reasonable time thereafter, such assistance shall be provided for them at the expense of the tribe as may be actually necessary for that purpose: *Provided, however,* That those who do not rejoin and permanently reunite themselves with the tribe within one year after the date of the ratification of this treaty shall not be entitled to the benefits of any of its stipulations."

(Treaty of 1859, 15 Stat., 467; Kappler, Treaties, 796.)

Said treaty of 1859 was not proclaimed until July 9, 1860.

"ARTICLE 8. No part of the invested funds of the tribe or of any moneys which may be due to them under the provisions of previous treaties, nor of any money provided to be paid to them by this treaty, shall be used in payment of any claims against the tribe accruing previous to the ratification of this treaty unless herein expressly provided for.

"ARTICLE 9. In order to promote the civilization of the tribe, one section of land, convenient to the residence of the agent, shall be

selected by said agent, with the approval of the Commissioner of Indian Affairs, and set apart for a manual-labor school; and there shall also be set apart, from the money to be paid to the tribe under this treaty, the sum of ten thousand dollars for the erection of the necessary school buildings and dwelling for teacher, and the annual amount of five thousand dollars shall be set apart from the income of their funds after the erection of such school buildings, for the support of the school; and after settlement of the tribe upon their new reservation, the sum of five thousand dollars of the income of their funds may be annually used, under the direction of the chiefs, in the support of their national government, out of which last-mentioned amount the sum of five hundred dollars shall be annually paid to each of the chiefs.

11 "ARTICLE 10. The United States agree to pay annually, for five years after removal of the tribe, the sum of fifteen hundred dollars for the support of a physician and purchase of medicines, and also the sum of three hundred and fifty dollars annually for the same time, in order that the tribe may provide itself with tobacco and salt.

"ARTICLE 21. The Sacs and Foxes of the Mississippi, parties to this agreement, being anxious that all the members of their tribe shall participate in the advantages to be derived from the investment of their national funds, sales of lands, and so forth, it is therefore agreed that, as soon as practicable, the Commissioner of Indian Affairs shall cause the necessary proceedings to be adopted, to have such members of the tribe as may be absent notified of this agreement and its advantages, and induce them to come in and permanently unite with their brethren; and that no part of the funds arising from or due the nation under this or previous treaty stipulations shall be paid to any bands who do not permanently reside on the reservation set apart to them by the Government in the Indian Territory, as provided in this treaty, except those residing in the State of Iowa; and it is further agreed that all moneys accruing from this or former tribes (treaties) now due or to become due said nation, shall be paid to them on their reservation in Kansas; and after their removal, as provided in this treaty, payment shall be made at their agency, on their lands as then located."

(Treaty of 1867, 15 Stat., 495; Kappler, Treaties, 951.)

V.

Your petitioners further represent that at the time the negotiations, if any, were conducted for making the treaty of 1859 some of your petitioners had not then left the reservation in Kansas; that they have no knowledge of any such negotiations, and that none of your petitioners had any knowledge of any negotiations for the making of the treaty of 1867, and they were not parties thereto, except as their treaty rights as members of the tribes "under this or previous treaty stipulations" were preserved and secured to your petitioners; that your petitioners believe that at the time of the making of the treaties of 1859 and 1867 the whereabouts of those members of the tribes then in the State of Iowa were

well known to the proper officers of the United States; that your petitioners have no knowledge of any proceedings adopted or taken by the Commissioner of Indian Affairs, as required by the seventh article of the treaty of 1859, to notify absent members of the tribe of the agreement, and, so far as they are informed, no such proceedings or action were adopted or taken; that your petitioners removed from the reservation in Iowa, with their tribes, under the requirements of the treaty of 1842, to the reservation in Kansas, and remained there about ten years, during which time the number of the tribes diminished nearly one-half by deaths resulting from disease, so that your petitioners, becoming alarmed for their lives and for other reasons of dissatisfaction, returned to their former country in Iowa, in a quiet and peaceable manner, and on arrival there at once made their presence known to the proper authorities of said State and their desire to reside therein, believing that said authorities were the proper representatives of the United States, and the legislature of that State enacted the following law as to them:

“(CHAPTER 30—INDIANS.)

“AN ACT permitting certain Indians to reside within the State.

“SECTION 1. *Be it enacted by the General Assembly of the State of Iowa.* That the consent of the State is hereby given that the Indians now residing in Tama county, known as a portion of the Sacs and Foxes, be permitted to remain and reside in said State, and that the Governor be requested to inform the Secretary of War thereof, and urge on said department the propriety of paying said Indians their proportion of the annuities due or to become due to said tribe of Sac and Fox Indians.

“SEC. 2. That the sheriff of said county shall, as soon as a copy of this law is filed in the office of the county court, proceed to
13 take the census of said Indians now residing there, giving their names and sex, which said list shall be filed and recorded in said office; the persons whose names are included in said list shall have the privileges granted under this act, but none others shall be considered as embraced within the provisions of said act.

“SEC 3. This act shall take effect from and after its publication in the *Iowa Capital Reporter* and *Iowa City Republican*, published at Iowa City.

“Approved, July 15, 1856.”

(A copy of said act, certified by the Secretary of the State of Iowa as having been published as required, will be found in the Annual Report of the Commissioner of Indian Affairs for 1891, page 681.)

Your petitioners further state that before they removed, with their tribes, from Iowa Territory, under the treaty of 1842, the Governor thereof occupied the relation of “*ex officio* superintendent of Indian affairs” within said Territory, and they supposed the Governor of the State sustained that relation to the United States, and that

in reporting to him they were actually making known their presence in Iowa and their desire to reside in that State to the proper representative of the United States for such purposes, and that the United States thus became cognizant of their presence there.

VI.

Laws Requiring Payment of Annuities to Indians Entitled Thereto.

That the laws regulating the payment of annuities and other moneys to Indians in force during the period covered by the claims sued upon are as follows:

"SEC. 3. *And be it further enacted*, That the eleventh section of the 'Act to provide for the better organization of the Department of Indian Affairs,' approved June thirtieth, eighteen hundred and thirty-four, be, and the same is hereby, so amended as to provide that all annuities or other moneys, and all goods, stipulated by treaty to be paid or furnished to any Indian tribe, shall, at the discretion of the President or the Secretary of War, instead of being paid over to the chiefs, or to such persons as they shall designate, be divided and paid over to the heads of families and other individuals entitled to participate therein, or, with the consent of the tribe, be applied to such purposes as will best promote the happiness and prosperity of the members thereof, under such regulations as shall be prescribed by the Secretary of War, not inconsistent with existing treaty stipulations."

(Act of March 3, 1847, 9 Stat., 203.)

"SEC. 3. *And be it further enacted*, That no part of the appropriations herein made, or that may be hereafter made, for the benefit of any Indian or tribe, or part of a tribe of Indians, shall be paid to any attorney or agent of such Indian or tribe, or part of a tribe; but shall in every case be paid directly to the Indian or Indians themselves to whom it shall be due, or to the tribe, or part of a tribe per capita, unless the imperious interest of the Indian or Indians, or some treaty stipulation, shall require the payment to be made otherwise, under the direction of the President."

(Act of August 30, 1852, 10 Stat., 56.)

"SEC. 2. That no supplies or annuity goods, for which appropriation is made in this act, shall be issued to any band or tribe of Indians while the same may be engaged in hostilities against the United States or in depredations upon settlers; nor shall any sum of money appropriated by this act for any tribe of Indians for whom a reservation or territory shall have been made be paid to them or expended for their benefit unless such tribe and the warriors thereof shall remain peaceably within the territory assigned to them, unless absent by the consent of the agent."

(Act of August 15, 1876, 19 Stat., 199.)

Regulations Requiring Payment of Annuities to the Indians Entitled Thereto.

"Annuity funds, except where otherwise clearly indicated by treaty stipulations, must be divided and paid to the individual members of the tribe entitled to participate therein in equal shares per capita, heads of families receiving for the amount due them, their wives, and the minor members of their families."

(Sec. 154, Ind. Of. Reg. 1894; 158 of 1884; 85 of 1880, etc.)

VIII.

Provisions of Treaties and Laws Specially Securing the Claimant Indians in Their Treaty Rights.

The provision of the treaty of 1867, in article 21 thereof, preserving to the claimant Indians their treaty rights is hereinbefore set out.

The treaty of 1867 was not ratified nor proclaimed until October 14, 1868. The attention of the Congress having been drawn to their situation, that body enacted the following provision of law for their benefit:

"That the Sacs and Foxes of the Mississippi, now in Tama (Tama) county, Iowa, shall be paid pro rata, according to their numbers, of the annuities, as long as they are peaceful and have the assent of the government of Iowa to reside in that State."

(Act of March 2, 1867, 14 Stat., 507.)

When the apportionment of the annuities between the two branches of the tribes was made under said law, the claimant Indians complained that they were not receiving their pro rata shares, according to their numbers, and refused to accept the amount

16 apportioned to them; whereupon the Department of the Interior secured the enactment of the following provision of law:

"That hereafter the Sacs and Foxes of Iowa shall have apportioned to them, from the appropriations for fulfilling the stipulations of said treaties, no greater sum thereof than that heretofore set apart for them."

(Act of May 17, 1882, 22 Stat., 78.)

The claimant Indians still persisted in their refusal to accept the amount apportioned to them from the annuities of the tribes, insisting that it was not their just proportion, according to their numbers and in accordance with their treaty rights; and, the matter having been more fully presented to the proper committees of Congress by them, the following provision of law was enacted:

"That hereafter the Sacs and Foxes of Iowa shall have appor-

tioned to them, from appropriations for fulfilling stipulations of said treaties, their per capita proportion of the amount appropriated in this act, subject to provisions of treaties with said tribes; but this shall apply only to the Sacs and Foxes now in Iowa: *And provided further*, That this shall apply only to original Sacs and Foxes now in Iowa to be ascertained by the Secretary of the Interior."

(Act of July 4, 1884, 23 Stat., 85.)

"That the Secretary of the Interior is directed to pay to Push-ten-neke-que, head chief of the Sac and Fox of the Mississippi Indians located in the State of Iowa, five hundred dollars per annum during the remainder of his natural life, beginning with and including the fiscal year nineteen hundred, in accordance with the terms of article four of the treaty proclaimed March twenty-third, eighteen hundred and forty-three."

(Act of May 31, 1900, 31 Stat., 245.)

IX.

That the census made under the law of 1884 showed that there were 317 original Sacs and Foxes in Iowa, being a much greater number than the number used as the basis for making the apportionment which said Indians had refused to accept; that the census made of the Sacs and Foxes in Oklahoma at the same time, but under no specific law therefor, showed that there were only 513 of them, being a much smaller number than had been used as the basis for the apportionment of the annuities between the two branches of the tribes therefore; that, notwithstanding such showing, the Department of the Interior refused and failed to correct the previous unequal apportionments; and, notwithstanding the claimant Indians have constantly increased in numbers and the defendant Indians have not so increased in numbers, but have decreased, the Department of the Interior has adhered to the numbers ascertained in 1884 as the basis for making the apportionment of the annuities of the tribes between the two branches thereof, contrary to the rights of the claimant Indians under the treaties, laws, and regulations on the subject.

X.

Recapitulation of the Annuities Arising Under Treaties.

The annuities enuring to the said confederated tribes of Sac and Fox Indians of the Mississippi under the treaty provisions hereinbefore set out in this petition, since the beginning of the year 1855, are as follows:

Treaty of 1804, Art. 3 (7 Stat., 84), perpetual	\$1,000.00
Treaty of 1832, Art. 3 (7 Stat., 374), 8 installments, each	20,000.00
Treaty of 1837, Art. 2 (7 Stat., 541), perpetual	10,000.00
Treaty of 1842, Art. 2 (7 Stat., 596), perpetual	40,000.00

The full amount of all annuities and benefits accruing to said confederated tribes for the years from 1855 to 1899, both inclusive, will be found set out in report of the Secretary of the Treasury, made on December 2, 1901, in response to a resolution of the House of Representatives, and printed in H. R. Doc. No. 38, 57th Congress, 1st session. Said report presents the data on the subject taken from the original accounts of disbursements on file in the Treasury Department, and shows what disposition was made of the annuities.

XI.

Claims Stated.

The aggregate amount of the annuities accruing to the Sac and Fox Indians of the Mississippi for the period from 1855 to 1866, both inclusive, as shown by the report of the Secretary of the Treasury, in said H. R. Doc. No. 38, pp. 2-7, was..... \$877,777.70

From that sum the following items should be eliminated, because separate claims involving them are hereinafter set up and sued for:

Amount expended under articles 4 and 5, treaty of 1859.....	\$51,237.93
Amounts paid to two chiefs, \$5,500 each	11,000.00
	62,237.93

Leaving balance of.....	\$815,539.77
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The whole of said sum of \$815,539.77 was paid to or expended for that branch of the said tribes now in Oklahoma, the defendant Indians in this suit, during said period, and no part thereof was paid to or expended for the Iowa branch of said tribes, the claimant Indians in this suit, during said period or at any other time, notwithstanding their rights therein as members of said confederated tribes under the laws and treaties applicable thereto.

19 That the average number of the two branches of the tribes for said period was as follows:

For the Oklahoma branch of the tribes (H. R. Doc. No. 38, Ex. "A")	1,175
For the Iowa branch of the tribes (<i>Ibid.</i> , pp. 20-26)	214

(The fraction over in reaching average of each branch is disregarded.)

The average number of both branches of the tribes...	1,389
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On the basis of said average number, each member of said confederated tribes was entitled to receive, during the period from 1855 to 1866, inclusive, the per capita share of \$587.14 of said sum of \$815,539.77; and that said per capita amount, multiplied by the average number of the Iowa branch of the tribes for said period, 214, shows that the amount that should have been apportioned to

them and either paid to or expended for them or retained for them by the United States, was \$125,647.96.

That amount is due and payable to the claimant Indians, and payment thereof is claimed and sued for by them.

XII.

The disbursements of the annuities and benefits accruing to the confederated tribes of Sac and Fox Indians of the Mississippi, under treaties with them, during the period from 1867 to 1899, both inclusive, as shown by the report of the Secretary of the Treasury, in H. R. Doc. No. 38, were as follows:

20 For the Oklahoma branch of the tribes:

Disbursed by agents (Ex. "B," pp. 8-16) \$1,430,387.30

The following items are eliminated for reasons stated:

Expended under treaty of 1859—a separate claim is hereinafter set out and sued upon under that treaty for interest in land fund thereunder. \$53,833.93

Paid for removal under treaty of 1867. 61,885.48

Purchase of bonds, treaty of 1867..... 60,839.50

Both of said items pertain to fund arising from sale of land under treaty of 1867, on which no claim is here made.

Expended for support of manual-labor school, treaty of 1867, no part of which expenditure is claimed. 66,828.26

Amount paid to chiefs (under treaty of 1842) 24,567.92

Separate claim for principal chief of the Foxes hereinafter set out.

Total amount deducted..... 267,955.09

Balance disbursed by agents..... \$1,162,432.21

Amount paid on claims by the Treasury Department 54,791.63

Total amount disbursed to and for Oklahoma branch \$1,217,223.84

21 For the Iowa branch of the tribes:

Disbursed by agents (Ex. "C," pp. 17-19) \$449,692.28

Paid on claims by Treasury Department 1,544.42

Total amount disbursed to and for the Iowa branch 451,236.70

Aggregate amount disbursed to and for both branches \$1,668,460.54

That the average numbers of the Indians of the two branches of the tribes for said period, based on the numbers stated in said Exhibits "B" and "C" of said Treasury report, are as follows:

For the Oklahoma branch of the tribes.....	506½
For the Iowa branch of the tribes.....	345½
Total average of both branches.....	852

That on the basis of said average number the per capita share of each member of said confederated tribes for said period was \$1,958.30, and that amount, multiplied by the average number of the Iowa branch of the tribe, 345½, shows the amount that should have been apportioned and paid to or expended for the claimant Indians to be..... \$676,592.65
They received, as shown above, only the sum of..... 451,236.70

Leaving a balance due and payable to them of. \$225,355.95

That amount is due and payable to the claimant Indians and payment of same is claimed and sued for.

22

XIII.

Your petitioners further represent that they have not had apportioned and paid to or expended for them their proportionate shares, according to their numbers, of the annuities of the tribes for the period from and including 1900 to the present time, and that such unequal distribution of the annuities between the two branches of the tribes, contrary to the rights of the claimant Indians, is still going on; that, so far as they are able to state at this time, not having access to the accounts of the disbursements made for said period or to any other record showing the exact amounts expended for each branch of the tribes, the apportionment and expenditure for them have been made on the basis of the average numbers as follows:

For the Oklahoma branch of the tribes.....	513
For the Iowa branch of the tribes.....	317

Total average for both branches..... 830

That the total amount of the annuities for said period, at least seven installments, appropriated, aggregated..... \$357,000.00
Deduct 7 installments of \$5,000 each for manual-labor school, on which no claim is made..... \$35,000.00
Deduct amount of annuity for chiefs, 7 installments for Sac chief and 6½ installments for Fox chief..... 6,750.00
\$41,750.00

Balance otherwise expended for both branches. \$315,250.00

23 That of said amount the claimant Indians were entitled to their proportionate shares, according to their numbers, as shown by the annual reports of the Commissioner of Indian Affairs, as follows:

Year.	Pages of report.	Number of Oklahoma branch.	Number of Iowa branch.
1900.....	648 and 642	467	385
1901.....	698 and 690	473	378
1902.....	642 and 634	479	338
1903.....	518 and 510	492	338
1904.....	608 and 598	491	345
1905.....	517 and 516	503	342
1906.....	482 and 481	508	343, and 11 other Indians not enrolled.
Totals.....		3,413	2,469, excluding 11 not enrolled.

Averages..... 487½; 352½.

That on the basis of those numbers the per capita share of each member of the tribes of the said aggregate sum of \$315,250.00, of the annuities for said period, should be \$375.19, and that amount, multiplied by the average number of the Iowa branch of the tribes, shows that they should have been apportioned or paid or had expended for them the sum of..... \$132,327.79

The amount believed to have been actually apportioned and paid to or expended for them, on the basis of the numbers first above stated in this paragraph, after deductions of \$35,000 for "national government" and \$8,050.00 for physician and medicines, it is believed, did not exceed..... 106,538.94

Leaving a difference due claimant Indians.... \$25,788.85

That amount is claimed and sued for.

24

XIV.

That for each year since 1855 that the principal chief of the Foxes has resided in Iowa the \$500 annuity payable to him under the 4th article of treaty of 1842 has been withheld from him and has been otherwise disbursed unlawfully, so far as your petitioners are informed on the subject, until such payment was, by legislative directions, resumed, in 1900, to Push-e-ten-neke-que, principal chief of the Foxes, residing among the Iowa branch of the tribes; the principal chief of the Foxes returned to Iowa in 1862, and the annuity has been withheld from him since that time and until June 30, 1899—37 years, at \$500 per annum, making \$18,500.00.

Payment of that amount is due to said principal chief of the Foxes and claim is made and sued therefor.

XV.

Claim upon Fund for Land Disposed of under Treaty of 1859.

Your petitioners further represent that, as members of said confederated tribes of the Sac and Fox Indians of the Mississippi, they had rights and interests in the land assigned to said confederated tribes by the President, under the treaty of 1842, in Kansas; that a portion of said land, by and under the treaty of 1859 (15 Stat., 467; Kappler, Treaties, 796), was disposed of and the proceeds arising therefrom were expended for those members of said confederated tribes then living in Kansas, now residing in Oklahoma; and no portion of said money was retained or apportioned for, or paid to, or expended for the members of said tribes residing in Iowa. Your petitioners, not having access to the accounts of disbursements or of receipts of said money, can only state their claim for their proportionate share of said money upon information obtained from other sources; that in the Annual Report of the Commissioner of Indian Affairs for 1865, pages 549-551, is found a statement of "*Indian trust lands*," which purports to set forth a history of the receipts and disbursements of the proceeds arising from the sale of said lands of the "Sacs and Foxes of the Mississippi"; that from that statement is taken the following:

"The number of acres offered for sale is.....	339,832.60
"The number of acres of land sold is.....	268,502.68
"Total amount of sales.....	\$282,439.27."

The further information contained in said statement is to the effect that the whole of the sum received from the disposal of said land, so far as then sold, was expended for the benefit of that branch of the Indians then residing in the State of Kansas, the defendant Indians in this cause. Your petitioners are not fully informed as to what disposition was made of the land reported in said statement as "acres unsold," unless the same was ceded to the United States, by and under the treaty of 1867, with other lands of the tribes in Kansas.

Your petitioners believe that the proceeds arising from the disposal of the said land were disbursed for the Oklahoma branch of the tribes, the defendant Indians, in the years 1861 to 1865; that the average number of the two branches of the tribes for those years, as shown in the report of the Secretary of the Treasury set out in H. R. Doc. No. 38, 57th Congress, 1st session, were as follows:

For the Oklahoma branch of the tribes.....	1,028
For the Iowa branch of the tribes.....	271
Total.....	1,299

That the per capita share of each member of the tribes of the said sum of \$282,439.27, on the basis of those numbers, would have been \$217.4282; that that amount, multiplied by the average number of the Iowa branch of the tribes, shows that

they should have had apportioned and paid to or expended for them the sum of \$58,923.04; that amount is due the claimant Indians and it is sued for; also such further amount of said land fund as may be shown at the hearing of this cause to be due and payable to the claimant Indians; and interest, at the rate of five per centum per annum, on the amount of the principal of said land fund that shall be found to be due and payable to the claimant Indians is also claimed and sued for from the time the proportionate share of claimant Indians was withheld from them, the computation of interest to begin not later than January 1, 1866.

XVI.

Your petitioners further represent that the annuities and other moneys claimed, as hereinbefore set forth, were withheld from them by the United States, and the same were improperly and unjustly paid to or expended for the defendant Indians; that both the Sac and Fox Indians of the Mississippi in Oklahoma and the United States are made defendants in this suit, in accordance with the provisions of the jurisdictional act; that the defendant Indians have to their separate credit on the books of the United States Treasury a fund of about \$250,000, out of which, to the extent thereof, any judgment in favor of the claimant Indians could be required to be satisfied.

XVII.

Your petitioners are the owners and the parties interested in the claims hereby sued for, and no assignment or transfer of said claims, or of any part thereof or any interest therein, has been made; and your petitioners are justly entitled to recover the amounts
27 claimed from the defendants, or either of them, after allowing all just credits and set-offs.

Your petitioners further state that R. V. Belt, of Washington, D. C., is and has been their attorney for the prosecution of said claims; that he has heretofore been and is now under contract with your petitioners for the service required for such prosecution; that he has rendered long and valuable services in connection with the prosecution of said claims in the executive branch of the Government and before the proper committees of Congress, and that he is fully authorized and empowered by your petitioners to conduct the prosecution of the claims of your petitioners in the courts, as provided for in the jurisdictional act of March 1, 1907, under which the claims set out in this petition are sued for.

Prayers.

Wherefore your petitioners, in consideration of the jurisdictional act and in consideration of the provisions of the treaties and laws, and of the facts and allegations hereinbefore set forth, pray that they have judgment against the defendants, the Sac and Fox Indians of the Mississippi in Oklahoma and the United States, or either of said defendants, as the liability may be determined by this court, for the

amounts claimed as follows, or such portions thereof as this court shall find the claimant Indians entitled to recover, "as justice and equity shall require:"

For unpaid annuities for the period from 1855 to 1866	\$125,647.96
For unpaid annuities for the period from 1867 to 1899	225,255.95
For unpaid annuities for the period from 1900 to 1906	25,788.85

28 Any additional amount of annuities justly and equitably due the claimant Indians and withheld from them since beginning of 1907 should also be allowed.

For unpaid annuities withheld from the principal chief of the Foxes, due and payable to him under the treaty of 1842, from 1862 to July 1, 1899....	18,500.00
For pro rata share of the claimant Indians in and to the proceeds arising from land disposed of under the treaty of 1859.....	58,923.04

Upon this last item, \$58,923.04, interest is claimed by the claimant Indians from January 1, 1866, or from such other date as shall be more certainly shown, on the hearing of this cause, to have been the true date said money was withheld from them.

The total amount of the principal sums claimed is	\$454,215.90
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Your petitioners pray for general relief.

THE SAC AND FOX INDIANS OF
THE MISSISSIPPI IN IOWA,
By PUSH-E-TEN-NEKE-QUE,
(Signed in Indian characters),
Principal Chief.

R. V. BELT,
416 Bond Building, Washington, D. C.,
Attorney for Claimant Indians.
STRUBLE & STIGER,
Toledo, Iowa, of Counsel.

29 STATE OF IOWA,
County of Tama, ss:

This 15th day of May, 1907, personally appeared before me, G. R. Struble, a notary public, Push-e-ten-neke-que, principal chief of the Sac and Fox Indians of the Mississippi in Iowa, who, being first duly sworn, deposeth and saith: The foregoing petition was carefully read and interpreted and explained to me before I signed the same, and that the allegations therein contained are true to the best of my knowledge, information, and belief.

PUSH-E-TEN-NEKE-QUE.
(Signed in Indian characters.)

Subscribed and sworn to before me this 15th day of May, 1907.

[Notarial Seal, Geo. R. Struble, Att'y-at-Law,
Toledo, Tama Co., Iowa.]

G. R. STRUBLE,
Notary Public.

30

II. *Answer of Defendants.*

Filed Feb'y 12, 1908.

Answer of the Defendants, the Sac and Fox Indians of the Mississippi in Oklahoma, to Amended Petition.

The defendants, the Sac and Fox Tribe of Indians in Oklahoma, now and at all times hereafter saving to themselves all and all manner of benefit or advantage of exception or otherwise that can or may be had or taken to the many errors, uncertainties and imperfections in the said amended petition contained, for answer thereto or to so much thereof as these defendants are advised it is material or necessary for them to make answer unto, answering respectfully say:

31

I.

These defendants are informed and believe and on information and belief they admit that some of the petitioners are members of the original tribe of the Sac and Fox Indians of the Mississippi and that some of such Indians and their ancestors now reside and have resided in the State of Iowa since the year 1855 or thereabouts.

They are informed and believe that it is not true, and on information and belief they deny that all of the Indians now in Iowa and commonly known as the band of Sac and Fox Indians in Iowa are Sac and Fox Indians, or are all Fox Indians, or are all Sac Indians, and these defendants pray and demand legal competent and strict proof as to the name, both now and in the past, the age, family history and antecedents of each and every member of petitioners' band of Indians.

They admit that they now reside in the State of Oklahoma and that they removed thereto from Kansas in the year 1869 in compliance with and under the terms of the treaty of 1867 between the tribe of Sac and Fox Indians of the Mississippi and the United States. That the name "Sac" is sometimes written as "Sauk," "Sock" and "Sack."

They are informed and believe it is not true and on information and belief they deny that all of the Indians constituting petitioners have always been recognized as members of the confederated tribe of Sac and Fox Indians, and they further so deny that any such Indians have always been recognized as members of such confederated tribe if the word "recognize" as used in said amended petition is intended to mean a recognition of the alleged and pretended rights

of such Indians as set forth in the said amended petition. In
32 further answer to the first paragraph of said amended petition
the defendant Indians upon information and belief allege and
state as follows:

After the removal of the confederated tribe of Sac and Fox Indians from Iowa to Kansas in the year 1845 it developed that a small portion of said tribe was opposed to the location in Kansas, that such portion consisted of shiftless, renegade, superstitious, improvident and unprogressive Indians who were bitterly opposed to education and the adoption of the white man's ways. That during the years 1854 or 1855 some of such Indians returned to Iowa and that subsequently, viz., during the period from 1862 to 1866, inclusive, others of them so returned. That these Indians settled on part of what had been their former reservation in Iowa. That the band of Indians which returned to Iowa, as above set forth, separated themselves from the tribe without permission of the authorities of the United States. That from the dates of their separation, as above set forth, until 1867 there was no Indian Agent or other agent of the United States with said band of Indians, nor were they in any manner during this period recognized by the United States or under its control or authority. That many of those comprising the band of Sac and Fox Indians in Iowa returned annually to the reservation of the tribe in Kansas and drew their annuities and other monies there and that this practice continued for many years. That the exact number of Indians, their names and the exact number of years during which they returned and drew their annuities and other monies as aforesaid is unknown to these defendants. That the band of Indians which returned to Iowa settled upon lands which were unhealthful, low, river bottom lands. That the band had no tribal physician. That

as a result of the above named and other causes numerous
33 members of the band perished and also because of exposure
incurred in the periodical hunts in which they indulged. That during a period of many years after the return of said band of Indians to Iowa they were reinforced by straggling members of other tribes of Indians, notably the Pottawatomies and Winnebagoes, who thus became associated with such band of Indians in Iowa and that they and their descendants have been received by said band of Indians in Iowa, and recognized and accepted as Sac and Fox Indians by said band. That the membership of the band of Indians which constitutes the petitioners herein has been made up in the manner as above set forth.

That during the year 1865 there was expended by the United States from the funds belonging to these defendants for the benefit of the band of Indians in Iowa who called themselves Sac and Fox Indians the sum of \$5,359.06. That this item of expenditure is shown on page 17 (Exhibit "C") of H. R. Doc. No. 38, 57th Congress, 1st Session. That the expenditure of said sum was deemed necessary by the Commissioner of Indian Affairs in order to relieve the suffering and distress of the members of said band to which they were subjected as a result of their inability to care for themselves.

That for many years Kee-o-kuck (or Keokuk) was the principal

chief of the Sac and Fox Indians of the Mississippi and that he signed, as chief, the treaty of 1832 and all subsequent treaties between the Sac and Fox Indians of the Mississippi and the United States. That his son Moses Keokuk (or Keokuk, Junior,) was for many years and up to the time of his death in 1903 a chief of said tribe of Indians. That Keokuk and Keokuk, Junior, were possessed of ex-

34 traordinary wisdom and foresight and were high-toned, progressive, capable Indians, who devoted their lives to the advancement and uplifting of their tribe. That the above named qualities possessed by Principal Chief Keokuk and his son Moses Keokuk were on numerous occasions recognized and gratefully acknowledged by the United States. That prior to the secession of petitioners as above set forth and at all times subsequent thereto these defendants have been progressive, industrious and peaceable, and have acted in entire harmony and in accord with the wishes and instructions of the Department of the Interior; and further that they have at all times faithfully and strictly adhered to and complied with each and every treaty provision which has been made with the United States and the tribe of Sac and Fox Indians of the Mississippi.

II.

These defendants admit the allegations contained in the second paragraph of the amended petition.

III.

These defendants are informed and believe it is not true, and on information and belief they deny, that no part of annuities or other monies appropriated by Congress for fulfilling treaty stipulations with the Sac and Fox Indians of the Mississippi was paid to or expended on behalf of petitioners during the years from 1855 to 1866. On such information and belief these defendants aver that during said period and afterward many members of the band of Indians who went to Iowa returned to Kansas annually and drew their annuities there, and that the sum of \$5,359.06 was expended for said In-

35 dians in the year 1865 from funds belonging to these defendants as is hereinbefore and more fully set forth in answer to the first paragraph of the amended petition herein.

These defendants are advised by their counsel and therefore aver that under the terms of the Treaties, Acts of Congress and Executive Regulations, said band of Indians in Iowa were not prior to 1867 entitled to receive any part of the annuities or other monies payable to the tribe of Sac and Fox Indians of the Mississippi.

They are informed and believe it is not true, and on information and belief they deny, that from 1867 to the present time the petitioners have not had apportioned, paid to or expended for them their proportionate share of annuities and other monies, but on the contrary these defendants on information and belief aver that during such period petitioners have had apportioned to them or paid to or expended for them sums of money belonging to the tribe greatly in excess of that to which they were entitled.

They are advised by their counsel and therefore aver that there was no annuity money nor any other money due from them to the alleged principal chief of the alleged Fox Indians in Iowa as such chief, under the treaty of 1842, or under any other treaty, and that it was and is impossible for petitioners to elect a chief who would be entitled to the salary of \$500 per annum under any treaty made between the Sac and Fox Indians of the Mississippi and the United States.

They are informed and believe and upon information and belief they aver that pursuant to Act of Congress of May 31, 1900 (31 Stats. L. 245) \$500 per annum were directed to be paid to Push-e-ten-neke, a chief, with petitioners during the life of said Indian, and that such payments were duly made.

They admit that petitioners have sought for many years
36 past to secure an adjustment of their alleged claims and that the various Congressional documents referred to in the third paragraph of their amended petition relate to petitioners' alleged claims.

They are informed and believe and on information and belief they aver that pursuant to Act of Congress of March 2, 1895 (28 Stats. L. 876-903) the Secretary of the Interior made a full and complete investigation of *all* of petitioners' claims as set forth in the memorial, signed by their then attorneys, and printed in Senate Misc. Doc. 48, 53d Congress, 3d Session, and that as a result of such investigation found petitioners were entitled to \$42,893.25 on account of the proceeds from tribal lands sold the Government. That said sum was duly transferred from the account of defendant Indians in the Treasury Department to that of petitioners'. That on petitioners' other claims as set forth in said Senate document the Secretary of the Interior found nothing to be due petitioners.

They aver that they did not concede that petitioners were entitled to the said sum of \$42,893.25 and that they sent their principal chief and second chief to Washington to oppose the payment of said sum to petitioners and that they made such opposition. That subsequently and while still in Washington they withdrew all such opposition upon and in consideration of an understanding with the Department of the Interior that the payment of said sum by defendant Indians was to be in full settlement of all claims of every character of petitioners against defendant Indians up to the date thereof.

They further aver as follows: That on June 29, 1906, the President of the United States sent the following message to the House of Representatives:

37 "To the House of Representatives:

"I return herewith without approval H. R. 10133, entitled 'An Act to provide for the annual pro rata distribution of the annuities of the Sac and Fox Indians of the Mississippi between the two branches of the tribe, and to adjust the existing claims between the two branches as to said annuities,' for the reasons enumerated in the accompanying extract from the Report of the Commissioner of Indian Affairs of February 12, and the letters of the Acting Commis-

sioner of Indian Affairs of June 25 and of June 28. I have directed the Acting Commissioner of Indian Affairs to have an immediate and thorough investigation made of the matter in accordance with the concluding paragraph of his letter of June 28, and after the report of this investigation has reached me I shall be prepared to give my assent to any bill which shall do justice both to the Indians in Iowa and the Indians in Oklahoma.

"THEODORE ROOSEVELT.

"The White House, June 29, 1906."

That pursuant to the directions given by the President to the Acting Commissioner of Indian Affairs, as referred to in said message, a thorough investigation was made but nothing was found due the petitioners from these defendants.

They deny that petitioners' claim for a proportionate share of the money accruing to the confederated tribe of Sac and Fox Indians of the Mississippi from the disposal of land of said tribe under the treaty of 1859 has not been heretofore presented for the consideration of any branch of the Government of the United States. On the contrary they aver that the Act of Congress of March 2, 1895, heretofore referred to, provides in part as follows:

"That the Secretary of the Interior be, and he is hereby, directed to examine the claim of the Sac and Fox Indians of the
38 Mississippi, now residing in the State of Iowa, as set forth in their memorial presented to Congress (Senate Miscellaneous Document Numbered Forty-eight, Fifty-third Congress, third session), for the payment of annuities and other sums from the tribal funds of said Sac and Fox Indians of the Mississippi and any and all claims of that portion of the tribe residing in Iowa, and to ascertain whether, under any treaties or acts of Congress, any amount is justly due them as a portion of said tribe from those of said tribe now in Oklahoma by reason of any unequal distribution of tribal annuities, *land funds*, or funds from other sources, and if so, how much, giving full opportunity to all parties in interest to be heard, and to report his conclusions to Congress at the next assembling thereof."

And that such investigation was made especially as to the alleged rights of petitioners for a further share in the proceeds of lands sold under the treaty of 1859. That on pages 11 and 12 of Senate Document numbered 167, 54th Congress, 1st Session, the report of the Secretary of the Interior is set forth and that the report upon this claim concludes as follows: "There is nothing found due under the provisions of the treaty of 1859."

IV.

These defendants admit that the following articles from treaties stated in the fourth paragraph of the amended petition are, subject to the omissions indicated, correctly quoted therein.

Art. 3 of the Treaty of 1804 (7 Stat. L. 84; Kappler, Treaties 74). Articles 3 and 4 of the Treaty of 1832 (7 Stat. L. 374; Kappler, Treaties, 349).

Art. 2 (eighth paragraph) of the Treaty of 1837 (7 Stat. L. 540; Kappler, *Treaties*, 495).

39 Art. 5 of the Treaty of 1842 (7 Stat. L. 596; Kappler, *Treaties*, 546).

Articles 1, 6 and 7 of the Treaty of 1859 (15 Stat. L. 467; Kappler, *Treaties*, 796).

Articles 8 and 10 of the Treaty of 1867 (15 Stat. L. 495; Kappler, *Treaties*, 951).

They deny that Art. 2 of the Treaty of 1842 is correctly quoted in the fourth paragraph of the amended petition and they aver that the following is a correct copy of Article 2 of said Treaty:

"ART. II. In consideration of the cession contained in the preceding article, the United States agree to pay annually to the Sacs and Foxes, an interest of five per centum upon the sum of eight hundred thousand dollars, and to pay their debts mentioned in the schedule annexed to and made part of this treaty, amounting to the sum of two hundred and fifty-eight thousand, five hundred and sixty-six dollars and thirty-four cents; and the United States also agree,

"*First.* That the President will as soon after this treaty is ratified on their part as may be convenient, assign a tract of land suitable and convenient for Indian purposes, to the Sacs and Foxes for a permanent and perpetual residence for them and their descendants, which tract of land shall be upon the Missouri river, or some of its waters.

"*Second.* That the United States will cause the blacksmiths' and gunsmiths' tools, with the stock of iron and steel on hand at the present agency of the Sacs and Foxes, to be removed, as soon after their removal as convenient, to some suitable point at or near their residences west of the north and south line mentioned in the first article of this treaty; and will establish and maintain two blacksmiths' and two gunsmiths' shops convenient to their agency, and will employ two blacksmiths, with necessary assistance, and two gunsmiths to carry on the said shops for the benefit of the

40 Sacs and Foxes; one blacksmiths' and one gunsmiths' shop to be employed exclusively for the Sacs, and one of each to be employed exclusively for the Foxes, and all expenses attending the removal of the tools, iron and steel, and the erection of new shops, and the purchase of iron and steel, and the support and maintenance of the shops, and wages of the smiths and their assistants, are to be paid by the tribe, except such portion thereof as they are now entitled to have paid by the United States, under the 4th article of the treaty made with them on the 4th of August 1824, and the 4th article of the treaty of the 21st of September 1832. And when the said tribes shall remove to the land to be assigned them by the President of the United States, under the provisions of this treaty, the smiths' shops above stipulated for shall be re-established and maintained at their new residence, upon the same terms and conditions as are above provided for their removal and establishment west of the north and south line mentioned in the first article of this treaty.

"Third. That the President of the United States will as soon as convenient after the ratification of this treaty, appoint a commissioner for the purpose, and cause a line to be run north from the painted or red rocks on the White Breast, to the southern boundary of the neutral ground, and south from the said rocks to the northern boundary of Missouri; and will have the said lines so marked and designated, that the Indians and white people may know the boundary which is to separate their possessions."

They deny that Art. 4 of the Treaty of 1842 is correctly quoted in the fourth paragraph of the amended petition and they aver that the following is a correct copy of Article 4 of said treaty:

"It is agreed that each of the principal chiefs of the Sacs and Foxes, shall hereafter receive the sum of five hundred dollars annually, out of the annuities payable to the tribe, to be used and expended by them for such purposes as they may think proper, with the approbation of their agent."

41 They deny that Art. 4 of the Treaty of 1859 is correctly quoted in the fourth paragraph of the amended petition and they aver that the following is a correct copy of Art. 4 of said treaty:

"ARTICLE IV. For the purpose of establishing the Sacs and Foxes of the Mississippi comfortably upon the lands to be assigned to them in severalty, by building them houses, and by furnishing them with agricultural implements, stock animals, and other necessary aid and facilities for commencing agricultural pursuits under favorable circumstances, the lands embraced in that portion of their present reservation, not stipulated to be retained and divided as aforesaid, shall be sold, under the direction of the Secretary of the Interior, in parcels not exceeding one hundred and sixty acres each, to the highest bidder, for cash; the sale to be made upon sealed proposals, to be duly invited by public advertisement, and the proceeds thereof to be expended, for the purposes hereinbefore recited, in such manner as the Secretary of the Interior may think proper. And should any of the tracts so to be sold have upon them improvements of any kind which were made by or for the Indians, or for Government purposes, the proposals therefor must state the price for both the land and the improvements. And if, after assigning to all the members of the tribe entitled thereto their proportion of land in severalty, there shall remain a surplus of that portion of the reservation retained for that purpose, outside of the exterior boundaries of the lands assigned in severalty, the Secretary of the Interior shall be authorized and empowered, whenever he shall think proper, to cause such surplus to be sold in the same manner as the other lands to be so disposed of, and to apply the proceeds of such sale to the purposes and in the mode hereinbefore provided with respect to that portion of their present reservation not retained for distribution."

They deny that Art. 9 of the Treaty of 1867 is correctly quoted in the fourth paragraph of the amended petition and they
42 aver that the following is a correct copy of Article 9 of said treaty:

"ARTICLE IX. In order to promote the civilization of the tribe, one section of land, convenient to the residence of the agent, shall

be selected by said agent, with the approval of the Commissioner of Indian Affairs, and set apart for a manual labor school; and there shall also be set apart, from the money to be paid to the tribe under this treaty, the sum of ten thousand dollars for the erection of the necessary school building and dwelling for teacher, and the further sum of five thousand dollars, if the chiefs shall so request; and the annual amount of five thousand dollars shall be set apart from the income of their funds, after the erection of such school buildings, for the support of the school; and after the settlement of the tribe upon their new reservation, the sum of ten thousand dollars of the income of their funds may be annually used, with the consent of the chiefs, under the direction of the Secretary of the Interior, for agricultural implements and assistance, purchase of stock, and otherwise in encouraging and assisting such of the tribe as will turn their attention to agriculture, and in support of their national government, for which last mentioned purpose the sum of five hundred dollars shall be annually paid to each of the five chiefs, two hundred dollars to each of ten councillors, two hundred dollars to their marshal, and the remaining three hundred dollars be subject to the disposal of the chiefs."

They deny that Art. 21 of the Treaty of 1867 is correctly quoted in the fourth paragraph of the amended petition and they aver that the following is a correct copy of Article 21 of said treaty:

"ARTICLE XXI. The Sacs and Foxes of the Mississippi, parties to this agreement, being anxious that all the members of their tribe shall participate in the advantages to be derived from the investment of their national funds, sales of lands, and so
43 forth, it is therefore agreed that, as soon as practicable, the Commissioner of Indian Affairs shall cause the necessary proceedings to be adopted, to have such members of the tribe as may be absent notified of this agreement and its advantages, and to induce them to come in and permanently unite with their brethren; and that no part of the funds arising from or due the nation under this or previous treaty stipulations shall be paid to any bands or parts of bands who do not permanently reside on the reservation set apart to them by the Government in the Indian Territory, as provided in this treaty, except those residing in the State of Iowa; and it is further agreed that all money accruing from this or former tribes, [treaties,] now due or to become due said nation, shall be paid them on their reservation in Kansas; and after their removal, as provided in this treaty, payments shall be made at their agency, on their lands as then located."

They admit that the treaty of 1859 was not proclaimed until July 9, 1860.

They do not admit that the various articles of treaties referred to in the fourth paragraph of the amended petition are the only provisions of treaties which are applicable and pertinent to a proper defense to petitioners' alleged cause of action.

V.

These defendants are informed and believe and on information

and belief they admit that in 1859 many of petitioners had not then left the reservation in Kansas.

They are informed and believe it is not true and on information and belief they deny that during the period from 1842 to 1852 the number of Indians constituting the tribe of Sac and Fox Indians of the Mississippi diminished by nearly one-half by deaths resulting from disease.

44 They admit that the Act of the Iowa Legislature approved July 15, 1856, is correctly quoted in the fifth paragraph of said amended petition.

In respect of the other allegations in the fifth paragraph of the amended petition contained, they have no knowledge, and neither admit nor deny the same, but so far as they are relevant and material to the case, they pray legal, competent and strict proof thereof.

VI.

These defendants admit that Section 3 of the Act of March 3, 1847 (9 Stat. L. 203) and Section 3 of the Act of August 30, 1852 (10 Stat. L. 56) are correct in so far as they are quoted in the sixth paragraph of the amended petition.

They deny that Section 2 of the Act of August 15, 1876 (19 Stat. L. 199) is correctly quoted in the sixth paragraph of the amended petition and they aver that the following is a correct copy of Section 2 of said Act:

"SEC. 2. That no supplies or annuity-goods for which appropriation is made in this act shall be issued to any band or tribe of Indians while the same may be engaged in hostilities against the United States or in depredations upon settlers; nor shall any sum of money appropriated by this act for any tribe of Indians for whom a reservation of territory shall have been made be paid to them or expended for their benefit, unless such tribe and the warriors thereof shall remain peaceably within the limits of the territory assigned to them unless absent by the consent of the agent."

They do not admit that the acts of Congress referred to in the sixth paragraph of the amended petition are the only provisions

45 of law, then or now in force and applicable to the payment of annuities to Indians nor to a proper defense to petitioners' alleged cause of action.

VII.

These defendants admit that the extract from section 154 of the Regulations of the Indian Office, Edition of 1894, stated in the seventh paragraph of the amended petition is a correct copy of the first sentence of said section of said regulations, but they do not admit that this is the only provision of the Indian Regulations then or now in force applicable to the subject of the payment of annuities to Indians nor to a proper defense to petitioners' alleged cause of action.

VIII.

These defendants admit that the Treaty of 1867 was not proclaimed until October 14, 1868.

They deny that the excerpt from the Act of Congress of March 2, 1867, (14 Stat. L. 507) is correctly quoted in the eighth paragraph of the amended petition and they aver that the following is a correct copy of the part of said Act referred to:

"*Provided*, That the band of Sacs and Foxes of the Mississippi now in Tama county, Iowa, shall be paid pro rata, according to their numbers, of the annuities, so long as they are peaceful and have the assent of the government of Iowa to reside in that State."

They deny that the excerpt from the Act of Congress of May 17, 1882, (22 Stat. L. 78) is correctly quoted in the eighth paragraph of the amended petition and they aver that the following is a correct copy of the part of said Act referred to:

46 "That hereafter the Sacs and Foxes of Iowa shall have apportioned to them from appropriations for fulfilling the stipulations of said treaties no greater sum thereof than that heretofore set apart for them."

They deny that the excerpt from the Act of Congress of July 4, 1884, (23 Stat. L. 85) is correctly quoted in the eighth paragraph of the amended petition and they aver that the following is a correct copy of the part of said Act referred to:

"That hereafter the Sacs and Foxes of Iowa shall have apportioned to them, from appropriations for fulfilling the stipulations of said treaties, their per capita proportion of the amount appropriated in this act, subject to provisions of treaties with said tribes; but this shall apply only to the Sacs and Foxes now in Iowa; And *Provided* further, That this shall apply only to original Sacs and Foxes now in Iowa to be ascertained by the Secretary of the Interior."

They admit that the excerpt from the Act of Congress of May 31, 1900, (31 Stat. L. 245) is correctly quoted in the eighth paragraph of the amended petition.

They do not admit that the Acts of Congress referred to in the eighth paragraph of the amended petition are the only provisions of law then or now in force and applicable to the payment of annuities or other monies to Indians nor to a proper defense to petitioners' alleged cause of action.

They are advised by their counsel and therefore aver that any and all rights which the petitioners or any of them may have secured by the Acts of Congress stated in said paragraph of the amended petition have been fully and completely accorded to petitioners.

47 In respect of the other allegation in the eighth paragraph of the amended petition contained, they have no knowledge, and neither admit nor deny the same, but so far as they are relevant and material to the case they pray legal, competent and strict proof thereof.

IX.

These defendants are informed and believe and therefore admit on information and belief that the census made under the law of 1884, showed that there were 317 Indians in Iowa who claimed to be Sac and Fox Indians.

They are informed and believe it is not true and on information and belief they deny that there were, at the time the census above

referred to was made, as many as 317 *original* Sac and Fox Indians in Iowa.

They are informed and believe and on information and belief they aver that at all times from and including the year 1867 the basis of apportionment to the Sac and Fox Indians in Iowa has been greatly in excess of the correct legal basis under the Act of the Iowa Legislature of July 15, 1856, set forth in the fifth paragraph of the amended petition, the Treaties, Acts of Congress and Executive Regulations applicable thereto.

They are informed and believe and on information and belief they admit that the number 317 has been used since and including the fiscal year 1885, as the basis of apportionment of the annuities of the band of Sac and Fox Indians in Iowa.

They are informed and believe and on information and belief they aver that the number used as a basis of apportionment to these defendants, from 1884 to 1886 inclusive, was 505 and from 48 1887 to the present time the number has been 513.

They are informed and believe and on information and belief they aver that the first payment of annuities to the band of Sac and Fox Indians in Iowa was in the year 1867 and amounted to \$11,174.66 per annum, which annual payment continued up to and including the fiscal year 1884. They further so aver that subsequent to 1884 and up to the present time, as above set forth, the basis of apportionment has been 317 and that on such basis the amount actually paid to said band has been \$15,219.80 each year.

They are advised by their counsel it is not true and therefore they deny that the apportionment of annuities referred to in the ninth paragraph of the amended petition was contrary to the rights of the petitioners under the treaties, laws and regulations on the subject.

In respect of the other allegations in the ninth paragraph of the amended petition contained they have no knowledge and neither admit nor deny the same, but so far as they are relevant and material to the case they pray legal, competent and strict proof thereof.

X.

These defendants admit the allegations contained in the tenth paragraph of the amended petition.

In respect of the statements in said H. R. Doc. No. 38, 57th Congress, 1st Session, referred to in the said tenth paragraph of the amended petition concerning the numbers of Sac and Fox Indians in Iowa at the various dates therein mentioned as set forth in Exhibit "C" therein, these defendants are informed and believe and on information and belief aver that such numbers do not represent "original" Sac and Fox Indians, within the meaning of the Act of the Iowa Legislature of July 15, 1856, set forth in the fifth paragraph of the amended petition, the Treaties, Acts of Congress and Executive Regulations pertaining to these Indians.

XI.

These defendants admit that H. R. Doc. No. 38, 57th Congress, 1st Session, states that \$877,777.70 is the total of expenditures made

by the United States on behalf of the Sac and Fox Indians of the Mississippi during the period from January 1, 1855, to December 31, 1867.

They are informed and believe it is not true and on information and belief they deny that the whole of the sum of \$815,539.77 was paid to or expended for these defendants during said period and that no part of said sum was paid to or expended on behalf of the band of Sac and Fox Indians in Iowa during said period. On the contrary these defendants are informed and believe and on information and belief they aver that many members of the band of Sac and Fox Indians which went to Iowa returned annually to the reservation in Kansas and drew their annuities there as is hereinbefore and more fully set forth in answer to the first paragraph of the amended petition.

They are so informed and believe and on information and belief deny that the remaining figures, methods of calculation and other statements set forth in the eleventh paragraph of the amended petition are correct or justifiable. They further so deny the accuracy and soundness of the alleged results from such figures and of each and every deduction attempted to be drawn therefrom.

50

XII.

These defendants admit that it is stated in Exhibit "B" in H. R. Doc. No. 38, 57th Congress, 1st Session, that \$1,430,387.30 were disbursed by the Agents on behalf of the Sac and Fox Indians at the reservation in Kansas and subsequently in Oklahoma for the various purposes therein set forth during the period from January 1, 1867, to December 31, 1899. They also admit that it is stated on page three of said document that during said period \$54,791.63 were expended on account of claims of said Indians.

They are informed and believe and on information and *belief* they aver that many of the Indians to whom the above sums were paid, and on whose behalf claims were paid, were Indians or the ancestors of Indians who are now members of the band of Indians in Iowa, commonly known as the Sac and Fox Indians in Iowa, the petitioners herein.

They admit that it is stated in Exhibit "C" in H. R. Doc. No. 38 as aforesaid, that \$449,692.28 were disbursed by the Agents in Iowa on behalf of the petitioners for the various purposes as therein set forth during the period from January 1, 1867, to December 31, 1899. They also admit that it is stated on page 4 of said document that during the said period \$1,544.42 were expended on account of claims of petitioners.

They are so informed and believe and on information and belief they deny that the remaining figures, methods of calculation and other statements set forth in the twelfth paragraph of the amended petition are correct or justifiable. They further so deny the accuracy and soundness of the alleged results from such figures and of each and every deduction attempted to be drawn therefrom.

XIII.

These defendants are informed and believe it is not true and on information and belief they deny that petitioners have not had paid to or expended for them their full proportionate shares of annuities for the period from and including the year 1900 to the present time.

They are so informed and believe and on information and belief deny that the figures, methods of calculation and other statements set forth in the thirteenth paragraph of the amended petition are correct or justifiable. They further so deny the accuracy and soundness of the alleged results from such figures and of each and every deduction attempted to be drawn therefrom.

XIV.

These defendants are informed and believe it is not true and on information and belief they deny that there has been at any time a principal chief of the Fox Indians in Iowa who was entitled to receive \$500 per annum from the tribal funds under the treaty of 1842 or under any other treaty. They further so deny that \$18500 or any part thereof is due from these defendants to any alleged chiefs among the band of petitioners on account of such alleged chief or chiefs' salaries under any treaty or Act of Congress.

In respect of the other allegations in the fourteenth paragraph of the amended petition contained, they have no knowledge and neither admit nor deny the same, but so far as they are relevant and material to the case they pray legal, competent and strict proof thereof.

XV.

These defendants admit that all loyal members of the tribe of Sac and Fox Indians of the Mississippi who resided on the reservation in Kansas had rights in such land, and that by the Treaty of 1859 a portion of such lands was sold to the United States.

They are informed and believe it is not true and on information and belief deny that there was any unequal, unlawful or improper distribution made of the proceeds of such sale, and that no portion of the proceeds of said sale was paid to or expended for petitioners.

They admit that in the annual Report of the Commissioner of Indian Affairs for the year 1867, published with the Report of the Secretary of the Interior, 1865-1866, there appears on pages 733 to 739, inclusive, a statement on the condition of trust lands of certain Indians, and that the number of acres offered for sale and the number of acres sold are correctly copied in the fifteenth paragraph of the amended petition from the above mentioned statement.

They deny that the total amount of sales is given in such statement as \$382,439.27, but on the contrary aver that the amount of this item as appears in said statement is \$282,439.27.

They deny that there is any further information in said statement to the effect that the whole of the sum received from the sale of said lands was expended for the benefit of the Indians then residing in the State of Kansas.

They are informed and believe and on information and belief deny that the figures and methods of calculation set forth in the fifteenth paragraph of the amended petition are correct or justifiable. They further so deny the accuracy and soundness of the alleged results from such figures and of each and every deduction attempted to be drawn therefrom.

53 In respect of the other allegations in the fifteenth paragraph of the amended petition contained, they have no knowledge, and neither admit nor deny the same, but so far as they are relevant and material to the case they pray legal, competent and strict proof thereof.

XVI.

These defendants deny that the annuities and other monies referred to in the sixteenth paragraph of the amended petition were witheld from petitioners and improperly and unjustly paid to or expended for these defendants.

They are advised by their counsel and therefore aver that the statement in said paragraph contained to the effect that they have to their credit in the United States Treasury a certain sum of money is immaterial, irrelevant and impertinent, and for these reasons the same should not be answered.

XVII.

These defendants deny that petitioners are entitled to recover from them the amount claimed in the amended petition, or any part thereof, on any grounds, legal, equitable or moral.

In respect of the other allegations in the seventeenth paragraph of the amended petition contained, they have no knowledge, and neither admit nor deny the same, but so far as they are relevant and material to the case they pray legal, competent and strict proof thereof.

XVIII.

54 These defendants further answering say that they constitute the tribe of Sac and Fox Indians of the Mississippi and that some of petitioners constitute a band of said tribe. That no treaty has ever been entered into between the petitioners and the United States, as a tribe, but on the contrary all treaties have been made by these defendants who have alone been recognized by the United States as the tribe of Sac and Fox Indians of the Mississippi.

XIX.

These defendants further aver and submit that the petitioners show no right to maintain this action against these defendants.

And having fully answered, these defendants pray that they may be hence dismissed with their reasonable costs in this behalf sustained.

THE SAC AND FOX INDIANS OF THE
MISSISSIPPI IN OKLAHOMA,
By McGOWAN, SERVEN & MOHUN,
Their Attorneys of Record.

DISTRICT OF COLUMBIA, ss:

Personally appeared before me, a notary public in and for the District of Columbia, Jonas H. McGowan, who being duly sworn according to law, deposes and says that he is a member of the firm of McGowan, Serven & Mohun, and as a member of said firm signed the firm name to the foregoing answer; that said firm has been duly authorized by power of attorney signed by W. C. Kohlenberg, Superintendent and Special Disbursing Agent of the Sac and Fox Indians in Oklahoma, and that said W. C. Kohlenberg was authorized by a resolution of the Sac and Fox National Council to execute such power of attorney on behalf of the Sac and Fox Tribe of Indians in Oklahoma; that said original power of attorney with a certified copy of aforesaid resolution was duly filed in the office of the Clerk of the Court of Claims on the 15th day of July, 1907. That deponent has read and understands the foregoing answer and that the matters and facts therein set forth are true in substance and in fact as he is informed and believes.

Subscribed and sworn to before me this 12th day of February, A. D. 1908.

MYDDLETON WOODVILLE,

[NOTARIAL SEAL.]

Notary Public, District of Columbia.

56

III. *Traverse.*

Filed April 6, 1909.

In the Court of Claims of the United States, December Term, A. D. 1909.

No. 29994.

THE SAC AND FOX INDIANS OF THE MISSISSIPPI IN IOWA

vs.

THE SAC AND FOX INDIANS OF THE MISSISSIPPI IN OKLAHOMA, and
THE UNITED STATES.

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

JOHN Q. THOMPSON,
Assistant Attorney General.

57

IV. *Argument and Submission of Case.*

On the 6th day of April 1909, this cause came on to be heard, when Mr. Robert V. Belt was heard in behalf of the claimants.

On April 7th, 1909, Mr. Belt was heard further for the claimants; Mr. Abram R. Serven and Mr. Barry Mohun were heard for the Indians in Oklahoma and Mr. George M. Anderson was heard for the United States.

On April 8th, 1909, Mr. Anderson was heard further for the United States; Mr. Belt closed for the claimants and the case was submitted.

58 On May 20, 1909, the Court filed findings of fact and conclusions of law dismissing the petition. On June 9, 1909, the claimants made a motion for a new trial. This motion was argued and submitted January 10, 1910. On March 21, 1910, the claimants' motion was allowed in part and overruled in part. Former findings were withdrawn and new findings were filed of which the following is a true copy:

V. Findings of Fact and Conclusions of Law and Opinion of the Court.

Filed March 21, 1910.

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

Findings of Fact.

I.

The act of Congress approved March 1, 1907 (34 Stats., 1055), conferring jurisdiction of the claim herein on this court is as follows:

"An Act to authorize the Court of Claims to hear, determine, and adjudicate the claims of the Sac and Fox Indians of the Mississippi in Iowa, against the Sac and Fox Indians of the Mississippi in Oklahoma, and the United States, and for other purposes.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That full legal and equitable jurisdiction, without regard to lapse of time, is hereby conferred upon the Court of Claims to hear, determine, and adjudicate, as justice and equity shall require, with right of appeal to the Supreme Court of the United States by any party in interest, all claims of the Sac and Fox Indians of the Mississippi in Iowa, against the Sac and Fox Indians of the Mississippi in Oklahoma, and the United States for money claimed to be due to them as their proportionate shares, according to their numbers, and not heretofore paid to or expended for them, of the appropriations made by Congress for fulfilling treaty stipulations with the confederated tribes of the Sac and Fox Indians of the Mississippi, or arising from the disposal or sale of lands of said confederated tribes, or otherwise, including the claims set out in the Senate Document Numbered Sixty-four. Fifty-seventh Congress, first session, for which suit may be instituted in the Court of Claims within ninety days after the passage of this act by petition signed by the principal chief of said Sac and Fox Indians in Iowa, or by the attorney employed by the proper au-

59 authorities of said Indians; the compensation to be paid to their said attorney by the Sac and Fox Indians of the Mississippi in Iowa, for his services and expenses rendered and to be rendered in the prosecution of said claims, shall be fixed by the Court of Claims on the termination of said suit. The Attorney-General shall appear and defend in said suit, so far as the United States may be concerned. The Sac and Fox Indians in Oklahoma may appear, by counsel employed by their proper authorities, to defend on their behalf. Said suit, on motion of either of the parties thereto, shall be advanced on the dockets of either of said courts and be determined at the earliest date practicable. The reports made to Congress on any of said claims by any Department of the Government and printed as congressional documents shall be received as evidence in said suit, so far as the facts therein may be concerned, and shall be given such weight as the court may determine for them."

II.

The confederated tribe of the Sac and Fox Indians of the Mississippi were in 1842 occupying a tract of country in what was then the Territory of Iowa. They numbered in that year 2,348 persons. Under the treaty of October 11, 1842 (7 Stats., 596), made between the Sac and Fox Indians of the Mississippi and the United States, said Indians ceded to the United States their land in Iowa, and as part consideration therefor they were to be assigned for their permanent residence a tract of land suitable and convenient for Indian purposes upon the Missouri River or some of its waters. The tract of land designated and assigned by the President for that purpose was in what is now the State of Kansas. During the years 1845 and 1846 said Indians removed from the State of Iowa to the reservation provided for them in Kansas in pursuance of said treaty. In 1846 said Indians numbered 2,278 persons and in 1851, 2,660 persons.

III.

In the year 1855 certain members of the Sac and Fox Indians of the Mississippi, residing on their reservation in Kansas, left said reservation without permission or authority from any officer or agent of the United States, and returned to the State of Iowa and settled there on what was formerly a part of the Sac and Fox reservation in that State. The number of such Indians, their names, sex, and ages are not shown by any competent evidence.

At intervals from 1862 to 1866 certain other members of the Sac and Fox tribe in Kansas left the reservation there without permission or authority from any officer or agent of the United States and joined their brethren in Iowa. The number of such Indians who thus subsequently returned to Iowa, their names, sex, and ages are not established by competent evidence.

IV.

On July 15, 1856, the legislature of Iowa passed an act as follows:

“(CHAPTER 30—INDIANS.)

“An Act Permitting Certain Indians to Reside Within the State.

“SECTION 1. *Be it enacted by the General Assembly of the State of Iowa*, That the consent of the State is hereby given that the Indians now residing in Tama County, known as a portion of the Sacs and Foxes, be permitted to remain and reside in said State, and that the governor be requested to inform the Secretary of War thereof, and urge on said department the propriety of paying said Indians their proportion of the annuities due or to become due to said tribe of Sac and Fox Indians.

“SEC. 2. That the sheriff of said county shall, as soon as a copy of this law is filed in the office of the county court, proceed to take the census of said Indians now residing there, giving their names and sex, which said list shall be filed and recorded in said office; the persons whose names are included in said list shall have the privileges granted under this act, but none others shall be considered as embraced within the provisions of said act.

“SEC. 3. This act shall take effect from and after its publication in the Iowa Capital Reporter and Iowa City Republican, published at Iowa City.

“Approved, July 15, 1856.”

After the passage of the above act the claimant Indians with their own funds purchased land in Tama County, Iowa, which they have ever since resided on and cultivated.

The number of Indians embraced within the terms of the above act of the Iowa legislature as then residing in Tama County is not shown, nor is their names, sex, and ages shown.

V.

From 1855 to 1866 there was no Indian agent or other officer or agent of the United States with said band of Indians in Iowa, and said Indians do not appear to have been recognized in any manner by the United States during that period. The fact that certain of the Sac and Fox Indians of the Mississippi had left their reservation in Kansas appears to have been known to the Government at the time the treaty of 1859 was entered into with said Indians as hereinafter set forth. Special Agent Leander Clark took a census of the Sac and Fox Indians in Iowa May 31, 1866, which showed the whole number of said Indians at that time to be 264, and he appears to have expended for goods and traveling expenses on account of annuities for the year 1865 the sum of \$5,359.06 for said Indians.

With the exception of the said sum of \$5,359.06 so expended for the year 1865 as aforesaid, all of the annuities and other moneys of the confederated tribes of the Sac and Fox Indians of the Mississippi from 1855 to 1866, both inclusive, were paid to or expended for said

Indians by the agents and superintendents at the Sac and Fox Agency, Kans.

VI.

Those Sac and Fox Indians who left Kansas in 1862 and thereafter and went to Iowa received their shares of the annuities at the last payments made before they left.

Whether any of those Indians who left the Sac and Fox reservation in Kansas and went to Iowa, as hereinbefore set forth, ever returned to Kansas and received their annuities is not shown by competent evidence.

61

VII.

October 1, 1859, the United States entered into a treaty with the confederated tribes of Sacs and Foxes of the Mississippi, at the Sac and Fox Agency in the Territory of Kansas (15 Stats., 467-471), by which it was provided that certain lands should be set apart for allotment in severalty and the surplus lands of the reservation should be sold to pay the debts of the confederated tribes of Sacs and Foxes or the individual members thereof. Article 7 of said treaty recited the fact that the Sacs and Foxes of the Mississippi were anxious that all members of the tribe should participate in the advantages of the treaty, and to that end invited all who were separated to rejoin and reunite with them, and it was agreed that the Commissioner of Indian Affairs, as soon as practicable, should have the nonresident members of the tribe notified of the advantages of the treaty in order to induce them to come in and unite with their brethren, "and to enable them to do so, and to sustain themselves for a reasonable time thereafter, such assistance shall be provided for them at the expense of the tribe as may be actually necessary for that purpose; provided, however, that those who do not rejoin and permanently reunite themselves with the tribe within one year from the date of the ratification of this treaty shall not be entitled to the benefit of any of its stipulations."

VIII.

On February 18, 1867, the Sac and Fox Indians of the Mississippi entered into a treaty with the United States—proclaimed October 14, 1868—by the terms of which said Indians ceded to the United States for the sum of \$1 an acre all of their lands in the Territory of Kansas and agreed to remove to a reservation in the Indian Territory, now the State of Oklahoma.

Article 8 of that treaty provided that no part of the invested funds of the tribe or of any moneys which may be due to them under the provisions of previous treaties, nor of any moneys provided to be paid to them by this treaty, shall be used in payment of any claims against the tribe accruing previous to the ratification of this treaty, unless herein expressly provided for.

Article 21 of said treaty expressed a desire on the part of the Sacs and Foxes of the Mississippi that all the members of their tribe should participate in the advantages to be derived from the invest-

ment of their national funds, sales of lands, etc., and it was agreed that, as soon as practicable, the Commissioner of Indian Affairs should cause the necessary proceedings to be adopted, to have such members of the tribe as may be absent notified of the agreement and its advantages and to induce them to come in and permanently unite with their brethren, and that no part of the funds arising from or due the nation under this or previous treaty stipulations shall be paid to any bands or parts of bands who do not permanently reside on the reservation set apart to them by the Government in the Indian Territory as provided in said treaty, except those residing in the State of Iowa.

In the Indian appropriation act of March 2, 1867 (14 Stats., 507), it was provided "That the band of Sacs and Foxes of the Mississippi, now in Tama County, Iowa, shall be paid pro rata according
62 to their numbers, of the annuities so long as they are peaceful and have the assent of the government of Iowa to reside in that State.

IX.

The first payment to the Sacs and Foxes in Iowa under said treaty of 1867 was made early in the year 1867, the proportion of said annuities so paid to them at that time being \$11,174.66, and payments to said Indians at that rate were continued up to and including the fiscal year 1884.

The numbers upon which said annuities were apportioned by the Secretary of the Interior fixing the amount to which claimant Indians were entitled at \$11,174.66 is not shown, and there does not appear to have been any fixed numbers adopted and used as a basis for apportionment during the period from 1867 to 1884, inclusive. Claimant Indians protested that the amount so apportioned to them was not their pro rata share according to their numbers, of the annuities, and thereafter refused to accept the amounts so apportioned to them, and continued to refuse to accept same until Congress by a provision in the Indian appropriation act of March 17, 1882 (22 Stats., 78), enacted.

"That hereafter the Sacs and Foxes of Iowa shall have apportioned to them from the appropriations for fulfilling the stipulations of said treaties no greater sum thereof than that heretofore set apart for them."

whereupon said Indians consented to receive the money apportioned to them from their tribal annuities.

X.

In the Indian appropriation act of July 4, 1884 (23 Stats., 85), it was provided "That hereafter the Sacs and Foxes of Iowa shall have apportioned to them, from appropriations for fulfilling the stipulations of said treaties, their per capita proportion of the amount appropriated in this act, subject to provisions of treaties with said tribes; but this shall apply only to the Sacs and Foxes now in Iowa: *And provided further*, That this shall apply only to original Sacs and

Foxes now in Iowa, to be ascertained by the Secretary of the Interior."

Thereupon, in pursuance of said act, the Secretary of the Interior caused the number of the Sac and Fox Indians in Iowa to be ascertained and found 317 original Sac and Fox Indians residing in that State. He also caused the number of the Indians on the Sac and Fox Reservation in Oklahoma to be ascertained and found there were on said reservation 505 Indians in 1884 and 513 in 1887.

Since that time these numbers, to wit, 317 for the claimant Indians and 513 for the defendant Indians, have been used and adopted as the basis of apportionment of the annuities of said tribes between the two branches thereof, except that in 1885 and 1886 the number used as the basis for the defendant Indians was 505.

XI.

In apportioning the \$51,000 appropriated by Congress annually for annuities to the Sac and Fox Indians of the Mississippi the Government has, from 1885 to the date of filing the petition
63 herein, first deducted from said \$51,000 the sum of \$11,500 provided for by the treaty of 1867, which amount was paid to or expended for the exclusive use and benefit of the Oklahoma branch, and then apportioned the remainder between the two branches of the Confederated tribes on the basis of 317 for the claimant Indians and 513 for the defendant Indians, and these numbers have been used and adopted as the basis of apportionment of the annuities between the two branches from 1884 to 1907, except for the years 1885 and 1886.

The competent evidence presented to the court does not show what increase, if any, or what decrease, if any, there was in the numbers of the respective tribes during said period.

XII.

Article 10 of the treaty of 1867 provides that the United States shall pay annually for five years after removal of the tribe the sum of \$1,500 for the support of a physician and purchase of the medicines. The five years expired with the fiscal year 1874. The whole amount so provided for was expended for the benefit of the defendant Indians. Since 1874 the amount expended for said purposes has been annually deducted from the appropriations of the annuities for said tribes before any apportionment of the amount between the two branches, and the whole amount so deducted between July 1, 1874, and June 30, 1907, is \$34,019.42, all of which was expended for the benefit of the defendant Indians.

XIII.

In 1895 the Sac and Fox Indians in Iowa presented a memorial to Congress asking for an adjustment of their claims:

(1) For their proportionate shares of the tribal annuities from 1854 to 1866, inclusive;

(2) For their just proportionate shares of the tribal annuities for the period from 1867 to 1894, inclusive, allowing them for said period their proportionate share of the \$10,000 for support of manual training school and the national government of the tribe, and for the amount used for physicians and medicine; and

(3) For their proportionate share of the proceeds of land ceded by the treaty of 1867, amounting to \$147,393.32.

Thereupon Congress passed an act approved March 2, 1895 (28 Stats., 876-903), directing the Secretary of the Interior to examine the claim of said Indians and ascertain whether under any treaties or acts of Congress any amount was justly due them, as a portion of the Sac and Fox Indians of the Mississippi.

In pursuance of said act of Congress the Secretary of the Interior made an investigation of all the claims of the Iowa band as set forth in the memorial to Congress, which claims are practically the same as those now sued upon.

As a result of said investigation the Secretary of the Interior found that on their third claim the claimant Indians were entitled to \$62,016.83 for their proportionate shares of the \$147,393.32 appropriated by the act of Congress of April 10, 1869, in payment for lands ceded under the treaty of 1867, from which he held there should be deducted \$11,523.18 interest theretofore paid and \$7,600 for over-

payments of annuities for the years 1885 and 1886, leaving
 64 the net amount found to be due to the claimant Indians \$42,893.25, and this sum was afterwards transferred on the books of the Treasury Department from the defendant Indians to the credit of the Sac and Fox Indians in Iowa.

The Secretary of the Interior also found that there was nothing due on the first claim for annuities from 1853 to 1867 for the reason that the same were forfeited in consequence of the Indians having abandoned their reservation in defiance of treaty stipulations and without consent of the United States.

On the second claim he found that there was nothing due, holding that the annuities had been properly and justly apportioned and paid between 1867 and 1894 in accordance with the provisions of the several treaties and acts of Congress.

Conclusion of Law.

Upon the foregoing findings of fact the court decides as a conclusion of law that the claimants are not entitled to recover and the petition is dismissed.

Opinion.

ATKINSON, J., delivered the opinion of the court.

The claimants herein file a motion for a new trial and amendments to the findings of fact, on the ground that the findings and judgment of the court heretofore rendered are contrary to the law and the evidence.

The special act of Congress authorizing the court to hear, deter-

mine, and adjudicate, as justice and equity shall require, the claims of the Sac and Fox Indians of the Mississippi in Iowa against the Sac and Fox Indians of the Mississippi in Oklahoma and the United States, is fully set forth in the findings and consequently need not be repeated here.

The Sac Indians first appear in treaty relations with the United States in 1789, when they were parties to a treaty with the Wyandotte and other Indians (7 Stats., 28). In 1804 (*ibid.*, 84) General Harrison was instructed to negotiate a treaty with them, the purpose being to secure control of the lands claimed by these Indians on the eastern side of the Mississippi River and to offer them proper compensation for the cession of the territory desired by the Government. In these negotiations the Fox tribe also appeared (their holdings being principally, if not entirely, on the west side of the Mississippi) and participated in the treaty. It was therein agreed that the Sacs should be paid an annuity of \$600 and the Foxes \$400 for the cession of their holdings, they being regarded as one nation (*ibid.*, 84), but they, however, preserved their separate tribal relations. Several additional treaties were subsequently negotiated with them, both as separate and as confederated tribes.

By the treaty of 1842 (7 Stats., 596) the Sac and Fox tribe was settled upon a reservation provided for them in Kansas, to which they were removed in 1845 and 1846 from their former reservation in Iowa. About the year 1855 a portion of the tribe, being dissatisfied with their Kansas location, left the reservation and returned to Iowa without the consent of the Indian agent in charge of them or other government officials.

65 In 1851 the Iowa legislature enacted a law authorizing them to remain in that State, but therein expressly provided that none but those at that time within the State should be embraced within its provisions. Here they purchased a tract of land with annuity funds which they had drawn prior to leaving their Kansas reservation and established themselves thereon, and there they still remain. It appears, however, that subsequent to 1855 and up until about 1867, other members of the tribe left the Kansas reservation and joined their brethren in Iowa, in violation of the act of the Iowa legislature. From 1855 to 1866 there was no Indian agent with the band in Iowa, and they were not recognized in any manner by the Commissioner of Indian Affairs or the Secretary of the Interior, and consequently no annuities were paid to them as such band.

In 1867 (15 Stats., 495) another treaty was made with the Sacs and Foxes by which they were granted certain lands in the Indian Territory (now Oklahoma) in lieu of their holdings in Kansas, and pursuant to this treaty the main tribe was removed thither in 1869, where they now remain. The year this treaty was concluded (1867) Congress enacted a law directing the Indian Office to pay the Iowa band their proportion of the annuities allotted to the Sac and Fox tribe, which has since that time been regularly done.

The claimant band of Sac and Fox Indians (those residing in Iowa) contend that from 1855 to 1867 they were entitled to their *pro rata* share of the annuities paid to the tribe while said tribe re-

maintained in Kansas and since they were located on the Oklahoma reservation, although they abandoned the tribe without its permission and contrary to the orders and authority of the Secretary of the Interior. They further contend that since 1867 they have been discriminated against in the distribution of annuities; that they are also entitled to a share in the proceeds of certain tribal lands sold to the United States pursuant to the treaty of 1859 (15 Stats., 467), and also to \$500 salary per year for their chief for a period of thirty-seven years. All of which aggregate the sum of \$454,215.80, with interest on a part thereof from an unascertained date, and for the recovery of which they bring this suit.

The defendant Indians in substance contend that claimants are not a legal entity and hence a judgment in their favor could not extinguish such an indebtedness as is alleged in the petition; that from 1855 to 1867, when the Iowa band was absent from the regular tribe, without permission and without recognition by the Indian Office, the members of such band were not entitled to any part or share of the tribal annuity funds; that they have already received a greater proportion of tribal funds than they were entitled to under the various laws and treaties; and that under the treaty of 1859 the President and the Congress had full power to distribute the annuity funds of the tribe in such a manner as would be most advantageous to the tribe. Further, that by the act of May 17, 1882 (22 Stats., 78), Congress and the President stamped with their approval the manner in which the Interior Department had paid the annuities prior to that date. In 1884 (23 Stats., 85) the Secretary of the Interior was directed by the Congress to ascertain the number of Indians in the Iowa band. This was done and a fair basis of apportionment arrived at, which basis has been since adhered to. The direction to the

Secretary of the Interior by said act of 1884 imposed upon
66 the Secretary the exercise of a discretion which in the absence of proof of abuse thereof or fraud can not now be inquired into by the courts; and, finally, that even though it should be shown that the claimants had received less than they were entitled to during the period covered by these claims, the United States are liable therefor and not the defendant Indians.

The United States have been made a party to the suit in order to comply with the legal requirement that where a suit is brought against a *cestui que trust* the trustee must be joined as one of the defendants, or where a suit is brought against a ward the guardian must also be made a party. It does not appear that in all of their numerous claims the claimant Indians have anywhere charged fraud in the official acts of the Interior Department, or that the money claimed was due them by the United States. Their contention is that they, as well as the defendant Indians, were wards of the Government, and that its agents had paid to the defendant Indians more than their proper share of certain specified funds due under various treaties between said defendant Indians and the United States. The fact that both Congress and the Indian Office have sought to deal fairly with both branches of this tribe is shown by the claim set out in Senate Document No. 167, Fifty-fourth Con-

gress, first session, wherein the Secretary of the Interior was directed to investigate certain claims of the Iowa band and report his findings thereon. This was done, as set forth in Finding XIII, and the report showed \$42,893.23 to be due from the defendant tribe to the claimant tribe, which amount was promptly allowed by Congress and was passed to the credit of the Iowa band on the books of the Interior Department.

In the case at bar it was stipulated by and between the attorneys for the claimant and defendant Indians that certain affidavits of the Iowa band might be read as evidence in the trial of this cause, but the United States, who are a party to the suit, by their attorney, refused to sign said stipulation and are therefore not bound by it. But even if all the parties to the suit had agreed to the proposed stipulation, the court would not be bound thereby. Counsel can not, by stipulation or otherwise, require a court to admit testimony which, under legal rules, is not admissible as evidence in a case. Hence said *ex parte* affidavits, even though they may be printed in the report of a Congressional committee, can not properly be admitted as testimony in this litigation.

We have thus far discussed the case in general terms, which brings us to a consideration of the specific claims contained in the petition.

I. The first claim made by the claimant Indians is for the annuities alleged to have accrued to them during the years 1855 to 1867, inclusive, while they were in Iowa and prior to their recognition, in any manner, by the Department of the Interior. It is conceded that various members of the Sac and Fox tribe of their own volition abandoned the tribal reservation in Kansas and returned to what was formerly a part of their reservation in Iowa, covering the period from 1855 to 1867; but the number that thus removed is not shown by competent evidence, nor is it shown how many of these Indians returned to Kansas, during that period, to receive their annuities, nor are their names given; but it does appear that some of them did thus return for that purpose. The court is, therefore, barred, for want of competent testimony, to properly consider this feature of the case.

67 Moreover, as these Indians had voluntarily and without the consent of the United States, withdrawn themselves from the reservation which had been provided for them by the Government they were no longer a legal entity; they were simply individual Indians who had willfully separated themselves from their tribe. The jurisdictional act, however, gives them a forum in which to maintain such rights as they may possess. (*Stewart v. The United States*, 206 U. S., 185.)

It has been the custom and policy of the Government not to pay to or reserve annuities for Indians who are absent from their reservation without permission, and the wisdom and force of this practice cannot be controverted. It was held by this court in the *Blackfeather case* (37 C. Cls., 233, 241), which was affirmed by the Supreme Court (190 U. S., 368), that "The United States, as the guardian of the Indians, deal with the nation, tribe, or band, and have never, so far as is known to the court, entered into contracts, either

express or implied, compacts, or treaties with individual Indians, so as to embrace within the purview of such contract or undertaking the personal rights of individual Indians."

It is clear that inasmuch as the claimant Indians had voluntarily left the Kansas reservation provided by the Secretary of the Interior for the habitat of the tribe, it was their plain and unqualified duty to return to the agency (which it appears that some of them did) prior to the dates of the annual payments, and see that their names were enrolled for their individual shares of the annuities, because they must have known that the treaties which provided said funds required payment to be made to the Sac and Fox tribe at their established agency, and not elsewhere.

In the *Journeycake* case (31 C. Cls., 140) it was decided by this court that all Cherokee freedmen, who had abandoned their reservation and failed to return, were entitled to no part of the tribal funds; and in the more recent case of *Pam-to-pee v. The United States* (187 U. S., 371) the same principle is clearly laid down. The trend of the decisions of this court, and of the Supreme Court as well, in this class of cases is to the effect that it is the duty of the Government to recognize tribes and not individual Indians in paying out annuities or other funds due to its Indian wards.

Considering all the facts which rightfully belong to this particular claim, the different treaties, the laws of Congress, the rulings of the Interior Department, and the decisions of the courts, we can not do otherwise than decide that no allowance can be made to claimants thereon.

II. The second claim, which is closely related to the first, is for a share of annuity funds in addition to the amounts already paid to claimants from 1867 to 1899, and is set forth in paragraph 12 of the amended petition.

The treaty of 1867 provided that thereafter the claimants should share, in proportion to their population, in the annuities allotted to the Sac and Fox tribe, and they were paid their proportion according to an enumeration of the tribe taken at that time, and were so paid annually until 1885. The defendants contend that there can be no relief accorded claimants under this claim for annuities paid prior to 1884, because Congress has stamped with its approval all such annuity payments; nor can there be a recovery for payments
68 made since that date because the money so paid has been disbursed strictly in accordance with the express provisions of a law enacted in that year, which gave the Secretary of the Interior discretionary powers in making the roll. (*Kimberlin v. Commissioners to the Five Civilized Tribes*, 104 Fed. R., 653.) Besides, the findings are not of a character upon which a judgment could be predicated, even though the legal principles for which claimants contend were well founded.

Under article 6 of the treaty of 1859 (15 Stats., 467) the President and the Congress were given absolute authority to establish a new basis for the distribution of the tribal funds of the Sac and Fox Nation. In the act of May 17, 1882 (22 Stats., 78), it was provided "That hereafter the Sacs and Foxes of Iowa shall have apportioned

to them from appropriations for fulfilling the stipulations of said treaties no greater sum thereof than that heretofore set apart for them." And the act of July 4, 1884 (23 Stats., 85), further provided "That hereafter the Sacs and Foxes of Iowa shall have apportioned to them, from appropriations for fulfilling the stipulations of said treaties, their *per capita* proportion of the amount appropriated in this act, subject to the provisions of treaties with said tribes; but this shall apply only to the Sacs and Foxes now in Iowa: *And provided further*, That this shall apply only to original Sacs and Foxes now in Iowa to be ascertained by the Secretary of the Interior.

Thus it appears that from 1882 to 1885 there could not be paid to claimant band of Indians a greater sum of money annually than they had received prior to that time, which may be construed as a legislative approval of the manner in which the fund had been distributed previous to that date.

Under the act of 1884, *supra*, the Secretary of the Interior caused a census of the original Sacs and Foxes in Iowa to be taken, which showed their population to be 317, and from that time, including the year 1885, they were paid upon the basis thus determined.

All the facts deducible from the admissible testimony bearing upon this particular claim are carefully set out in the findings. Under the act of March 2, 1895 (28 Stats., 876-903), the Congress directed the Secretary of the Interior to examine the claims of the claimant Indians, and ascertain whether under treaties or acts of Congress any amount is justly due them as a part of the Sac and Fox tribe of Indians of the Mississippi. In pursuance of said act the Secretary of the Interior made an investigation of all of the claims of the Iowa band as set forth in their memorial to the Congress, which claims are practically the same as are involved in this suit. The investigation was duly made, and a balance of \$42,893.25, as heretofore stated, was found to be due them, which amount, as shown by Finding XIII, was promptly paid.

III. The third item, which is set out in paragraph 13 of the amended petition, avers that claimants are entitled to \$25,788.85 on account of an alleged unequal apportionment of annuities from 1900 to the time the suit was instituted. This claim is simply a continuation of the second. The two claims should have been considered together as one claim for the whole period of both. What we have said under the head of the second item applies with equal force to this one, and consequently no allowance can be made.

69 IV. This is a claim for \$500 a year for thirty-seven years' salary of the alleged chief of the claimant Indians. This claim is predicated on article 4 of the treaty of 1842, *supra*, which reads:

"It is agreed that each of the principal chiefs of the Sacs and Foxes, shall hereafter receive the sum of five hundred dollars, annually, out of the annuities payable to the tribe, to be used and expended by them for such purposes as they may think proper, with the approbation of their agent." (7 Stats., 596.)

This article is an agreement between the United States on the one part, and the tribe on the other, providing that out of the annuities

"payable to the tribe" \$500 should be payable to each of the "principal chiefs," but "with the approbation of their agent." Subsequently a portion of the tribe of their own volition separated themselves from the main tribe and were without an agent up to the year 1867. Had an agent in Kansas approved a payment to an alleged chief in the Iowa band, there would even then have been grave doubt of the legality under this provision to make such payment in view of the separation. If this were allowable, tribes would be rent and there would be no end to the confusion that would follow. While it is true that the act of May 31, 1900 (31 Stats., 245), directed the Secretary of the Interior to pay to the head Chief of the Iowa band \$500 salary per year, during the remainder of his natural life, *beginning* with the fiscal year of 1900, yet that does not imply that Congress intended that the chiefs who preceded him should also be paid a like salary, thus making the act retroactive. On the contrary, beginning with the fiscal year 1900, the court is prohibited from going back of that date. Much would have to be read into the act to authorize such procedure, and this we are not authorized to do. This is the construction given to the act by the Secretary of the Interior, and under the authorities we have already cited under the first item of the petition we would not be justified in overruling him. Nor is there anything in the special jurisdictional act controlling or that would justify such action. Hence no allowance can be granted under this claim.

V. The fifth and last item of the claim, which is contained in the fifteenth paragraph of the amended petition, relates to a share in a fund for land disposed of by the Sac and Fox tribe pursuant to the treaty of 1859, *supra*, and interest on the amount which may be found due and payable to the claimant Indians. We can find no line of competent testimony in the record to justify this contention. This claim was never presented to the Interior Department, and even if it were a proper claim against the defendants and was sustained by competent proof, we can see no way by which the court could arrive at the amount which might be due and render a judgment therefor. Furthermore, it is contended by defendant's counsel that there are not now and never were any funds in the Treasury derived from the cession of these lands, the money having been used according to the terms of the treaty in the payment of the debts of the Sac and Fox tribe of Indians. The treaty provided that all Indians absent from the tribe might return and participate in the benefits of its provisions. There is no competent proof in the record to enlighten the court as to the number of Indians who abandoned the tribe from 1855
70 to 1867, or how many returned during that period and participated in the distribution of the tribal funds, or how many finally returned to the Oklahoma reservation and thereafter became permanent members of the tribe. In the absence of proof to the contrary, it is only just to assume that those who did not return to the tribe until 1862 shared in the benefits of the treaty of 1859, and as no proper effort has been made by claimants to show who the Indians were that had returned to Iowa prior to 1859, and what,

if any, relationship, legal or otherwise, they bear to the claimants in this case, no allowance can be made.

Furthermore, the Supreme Court has decided that there is no vested interest in unallotted tribal lands and undistributed tribal funds. As was said in the case of *Stephens v. The Cherokee Nation* (174 U. S., 445), "* * * the lands and moneys of these tribes are public lands and public moneys, and are not held in individual ownership, and the assertion by any particular applicant that his right therein is so vested as to preclude inquiry into his status involves a contradiction in terms." The same principle was laid down in *Wallace v. Adams* (143 Fed. R., 716), which was subsequently affirmed by the Supreme Court (204 U. S., 415).

From what we have said above there can be no allowance to claimants on this branch of the case.

The claimants' motion to amend findings is allowed in part and overruled in part. The former findings are withdrawn and new findings this day filed in lieu thereof. Judgment to stand.

71 VI. *Judgment of the Court.*

No. 29994.

THE SAC AND FOX INDIANS OF THE MISSISSIPPI IN IOWA
vs.

THE SAC AND FOX INDIANS OF THE MISSISSIPPI IN OKLAHOMA, and
THE UNITED STATES.

At a Court of Claims held in the City of Washington on the 21st day of March 1910, judgment was ordered to be entered as follows:

The Court on due consideration of the premises find for the defendants and do order, adjudge and decree, that the petition of the claimants, The Sac and Fox Indians of the Mississippi in Iowa, be, and the same is hereby dismissed.

BY THE COURT.

72 VII. *Application for and Allowance of Appeal.*

From the judgment or decree rendered in the above-entitled cause on the 21st day of March, 1910, in favor of the defendants, the claimants by Kappler & Merillat, their attorneys of record, on the 31st day of May, 1910, make application for and give notice of an appeal to the Supreme Court of the United States.

KAPPLER & MERILLAT,
Attorneys of Record for Claimants.

Filed June 1, 1910.

Ordered: That the above appeal be allowed as prayed for.

BY THE COURT.

June 6, 1910.

73 VIII. *Motion of Claimants to Include Whole Record in Transcript.*

Filed June 4, 1910.

Come now the claimants by Kappler & Merillat, their duly constituted and appointed attorneys of record and move this honorable court:

That in preparing the record for transmission to the Supreme Court of the United States in pursuance of the appeal heretofore taken in said cause by claimants, the Clerk of this court be instructed to include in said transcript of the record of the proceedings in said cause all of the pleadings, orders, stipulations, evidence, findings of fact, opinions of the court, conclusions of law and decree as the same appear of record in this court.

KAPPLER & MERILLAT,
Attorneys of Record for Claimants.

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WASHINGTON, D. C., June 6, 1910.

Messrs. McGowan, Serven & Mohun, and Hon. John Q. Thompson,
Assistant Attorney General:

Please take notice that we have this day filed the foregoing motion in the Court of Claims with a memorandum of authorities therefor, which memorandum of authorities is transmitted to you herewith.

KAPPLER & MERILLAT,
Attorneys for Claimants.

NOTE.—On May 31, 1910, on motion filed and allowed by the court, Messrs. Kappler & Merillat were substituted as attorneys for claimant in lieu of Robert V. Belt, deceased.

75 IX. *Defendant's (The United States) Objections to Include the Evidence in the Transcript of Record.*

Filed June 4, 1910.

The claimants have filed a motion in this case praying the court to include in the transcript of record the evidence in the case. If there had been any competent evidence taken in the case the defendants would have offered no objection to its inclusion in the transcript. However, there has been no evidence taken under the rules of court, or admissible under the rules of evidence, filed in this case. The claimants have offered in evidence nine or ten affidavits, to the admission of which the attorney for the Government has vigorously protested at every stage of the proceedings. In addition to these affidavits, there has been offered in evidence by the claimants a number of reports of committees of Congress, most, if not all

76 of which, as developed at the trial of the case, were admitted to have been prepared by the attorney for the claimant Indians. These reports independently of this fact, are not evidence and should not be admitted as such.

In conclusion, we make the statement, and practically the same statement is made in the opinion of the court, that there is not one scintilla of competent evidence produced by the claimants in this case; therefore there is no evidence to transmit, as this court has the undoubted right to pass upon the admissibility of the evidence filed in the case.

Respectfully submitted,

GEORGE M. ANDERSON,
Attorney for the United States.

X. Allowance of Motion to Include Whole Record in Transcript.,

Ordered: That the claimants' motion, filed June 4, 1910, to include the whole record in the transcript of appeal, be allowed as prayed for.

June 9, 1910.

BY THE COURT.

77 *XI. Evidence Transmitted in Pursuance of Foregoing Motion.*

Index.

Report of Interior Department.

Containing—

Letter of Hon. James W. Grimes dated January 13, 1863, to Commissioner of Indian Affairs.

Letter of Hon. S. J. Kirkwood, dated November 5, 1862, to Hon. James W. Grimes.

Report of George L. Davenport dated September 26, 1862, to Governor Kirkwood.

Statement in reply to request for number of Sac and Fox Indians of the Missouri who have been enrolled, adopted, and allowed to draw annuities with Sac and Fox Indians of the Mississippi since the year 1855.

Statement in reply to request for numbers as basis for apportionment between Sac and Fox Indians in Oklahoma and the band in Iowa from 1867 to 1884.

Statement showing basis of apportionment during years from 1884 to 1886, inclusive, and during years from 1887 to 1907, inclusive.

Statement showing number of Indians adopted by the Sac and Fox Indians of the Mississippi in Oklahoma since 1866.

Statement showing number of Indians adopted by the band of Sac and Fox Indians in Iowa since 1884.

Statement in reply to request for information as to the amount

of money realized from sale of lands under the treaty of 1859 and the disposition thereof.

Statement showing date of approval by the Secretary of the Interior of allotments of land to the Sac and Fox Indians in Oklahoma.

Statement showing amount of money now to the credit of the Sac and Fox Indians of the Mississippi in Oklahoma from records in Indian Office.

Report of Acting Commissioner of Indian Affairs dated June 28, 1906, to the President on bill H. R. 10133 concerning claims of Sac and Fox Indians in Iowa.

Statement in reply to request for copies of correspondence or papers showing what, if any, proceedings or action were taken by the Commissioner of Indian Affairs to notify absent members of the tribe, as required by treaty of 1859.

Report of Treasury Department.

Containing—

Statement showing amounts disbursed by the agent with the Sac and Fox Indians in Oklahoma and by the agent with the band of Sac and Fox Indians in Iowa from January 1, 1900, to June 30, 1907, on behalf of said Indians, respectively, and showing amounts paid for claims, annuities, services, and supplies, etc., during this period.

78 Report of Interior Department.

Containing—

A further statement in regard to the total amount of money realized from the disposal of the land of the tribe under the treaty of 1859.

Letter from Hon. D. N. Cooley, Commissioner of Indian Affairs, dated October 31, 1865, to Perry Fuller.

Report of Treasury Department.

Containing—

Statement in reply to request for information showing how much of the debts of the Indians, which were liquidated under the 5th article of the treaty of 1859, was contracted or incurred by the "Confederated Tribe of Sacs and Foxes" and how much "by individual members thereof."

Report of Interior Department.

Containing—

Telegram from Chas. Benish, clerk of the court at Toledo, Iowa, bearing date November 13, 1906, to Hon. C. F. Larrabee, Acting Commissioner of Indian Affairs, in regard to Indian census.

Affidavit of Mah-ko-sa-toe (Chief McKosito), principal chief of the Sac and Fox -ribe of Indians, bearing date November 7, 1906.

Joint affidavit of David Wakolle, second chief of the Sac and Fox tribe of Indians, and of six councillors bearing date November 7, 1906.

Affidavit of Jonas H. McGowan bearing date December 11, 1906.

Letter from Hon. W. A. Jones, Commissioner of Indian Affairs, bearing date February 3, 1904, to the Secretary of the Interior.

Opinion of Assistant Attorney-General John I. Hall to the Secretary of the Interior bearing date September 23, 1895.

Letter from Hon. F. E. Leupp, Commissioner of Indian Affairs, to the President bearing date December 29, 1906.

Report of Interior Department.

Containing—

Answer made by claimant Indians to protest presented by defendant Indians against legislation pending in Congress in 1903, for the adjustment of the claims of claimant Indians, said protest being addressed to Hon. G. R. Cousins.

Stipulation between counsel for claimant Indians and counsel for defendant Indians bearing date February 12, 1908.

Report of Interior Department.

Containing—

Statement showing manner in which the \$500 annual payment is made to Chief Push-e-ten-neke-que.

Letter from Hon. F. E. Leupp, Commissioner of Indian Affairs, bearing date February 12, 1906, to the Superintendent of the Sac and Fox school, Oklahoma.

Letter from Hon. C. F. Larrabee, Acting Commissioner of Indian Affairs, to the Secretary of the Interior bearing date June 25, 1906.

Letter from Hon. D. N. Cooley, Commissioner of Indian Affairs, to Elijah Sells, esq., bearing date November 17, 1865.

Report of Interior Department.

Containing—

The opinion of Assistant Attorney-General John I. Hall to the Secretary of the Interior bearing date December 23, 1895.

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DEPARTMENT OF THE INTERIOR.

OFFICE OF INDIAN AFFAIRS.

WASHINGTON, July 13, 1907.

The Secretary of the Interior.

SIR: I have the honor to acknowledge the receipt by Department reference of two requests from the Court of Claims, dated May 7 and May 31, respectively, for certain information for use as evidence in the trial of the cause entitled "The Sac and Fox Indians of the Mississippi in Iowa vs. the United States" (No. 29994), and to report thereon as follows:

Request of May 7, 1907.

Paragraph 1. For copy of letter of Hon. James W. Grimes, U. S. Senate, dated January 13, 1883, to the Commissioner of Indian Affairs, with copies of its enclosures, to wit: Letter of Hon. S. J. Kirkwood, Governor of Iowa, and report of Geo. L. Davenport, all upon matters of the Sac and Fox Indians of the Mississippi in Iowa.

Answer. Copies of said letters are herewith inclosed.

Paragraph 2. The number of Indians of the Sac and Fox Indians of the Missouri enrolled, adopted, and allowed to draw annuities with

the Sac and Fox Indians of the Mississippi, since the beginning of 1855, with copies of the authorities of the Department therefor; attention being specially invited to annual reports of the Indian Office for 1858, p. 118; 1859, 142; and 1860, 110; and 1861, 99, on the subject.

Answer. It is impossible to obtain any data on this subject which could be regarded as accurate and reliable, owing to the incompleteness of the records during the first part of the period covered by the inquiry. That there were some Sac and Fox of the Missouri Indians enrolled and allowed to draw annuities with the Sacs and Foxes of the Mississippi appears certain from the reports to which reference is made, but there is no way of ascertaining their number or whether their enrollment was approved by the Department.

In this connection attention is invited to answers to queries numbered 5 and 6.

Paragraph 3. For the number of the confederated tribes of Sac and Fox Indians in Iowa, and of those of the same tribes in Oklahoma, adopted and used as basis for apportionment of the annuities of said tribes between the two branches thereof, from January 1, 1867, to completion of the census of them required by the law of 1884 on the subject.

Answer. From the best information obtainable there does not appear to have been any fixed numbers adopted and used as basis for apportionment during the period specified.

Paragraph 4. The numbers of said two branches of the said tribes adopted and used for the same purpose, for the years since the completion of the census required to be taken by the law of 1884.

Answer. Iowa Branch, 317; Oklahoma Branch, 505 from 1884 to 1886 inclusive and 513 from 1887 to 1907, inclusive.

Paragraph 5. The number of Indians of other tribes, other than those of the Sac and Fox Indians of the Missouri, or of persons not of Indian blood, adopted and enrolled as members of the Sac and Fox Indians of the Mississippi in Oklahoma, with the authorities therefor.

Answer. An examination of the annuity rolls of the Oklahoma branch of the Sac and Fox Indians of the Mississippi, from 80 1866 (the earliest rolls on file in this Office) to the present time, shows the following persons to have been adopted and enrolled who evidently belonged to other tribes, but whether they were Sacs and Foxes of the Missouri or not it would be impossible to say:

On voucher 28, 2d quarter, 1895 (No. 18), Emma Jones, apparently enrolled on account of her marriage to Henry J. Jones (No. 17).

Maud Whistler (No. 155 on same roll), appears to have been enrolled on account of her marriage to Leo Whistler (No. 154).

No authority is shown for either of these enrollments.

Peick-e-skaw and Men-o-quah-to-que (Nos. 531 and 532), voucher 7, 2d quarter, 1897, are shown to have been "enrolled by permission," such permission evidently having been granted on account of their

being married to Ma-toh-nah-ne (No. -475) and Ah-she-puk-ka (No. 197), respectively.

Attached to voucher No. 2, 1st quarter, 1886, is a relinquishment by the following Indians of all their rights in other tribes in consideration of their being adopted into and allowed to share annuities and other privileges with the Sac and Fox of the Mississippi tribe:

No.	Name.	First appears on roll.
24	No-ten-we-quah.....	December, 1877.
26	Man-ah-quaw-se-ah.....	June, 1879.
47	Dose.....	December, 1877.
90	Ke-nah-kon-ko-quah.....	November, 1882.
113	Nah-moh-sque-mo-ke.....	June, 1879.
150	Waw-che-quah.....	March, 1880.
131	Waw-ko-shah-pol-law-skaw.....	June, 1879.
129	Nah-mos-swe.....	December, 1877.
195	Kal-ah.....	June, 1878.
201	Melissa Jones.....	December, 1877.
219	Waw-se-tal-o-quah.....	June, 1878.
247	Sarah Harris.....	June, 1879.
328	Mesh-swaw.....	August, 1880.
361	Charlotte Thorp.....	November, 1882.
404	Ko-se-que.....	January, 1879.
429	Kah-pah-yah.....	December, 1877.
227	Mah-teck-co.....	January, 1886.

It is not understood why such a relinquishment was signed at this time, inasmuch as at least some of the persons named had been carried on the rolls since 1877, and perhaps longer, as the rolls previous to that time contained the names of none but heads of families. There is nothing to show from what tribe or tribes these persons came, with the exception of Mah-teck-co (No. 227), a Shawnee woman who was adopted by the chiefs in 1886. At this time she was the wife of Papo Stanley, and had been living with the tribe for ten years.

Paragraph 6. The number of Indians of other tribes, or persons not of Indian blood, adopted and enrolled as members of the Sac and Fox Indians of the Mississippi in Iowa since the completion of the census made under the law of 1884, with the authorities therefor.

Answer. Since the completion of the census made of the Iowa branch under the law of 1884, three persons, who it is believed, were not members of the Sac and Fox Tribe, were enrolled. All of these names appear for the first time on voucher No. 1, 2d quarter, 1886, as follows:

No. 365, She-shut (Thomas Hawkins) who apparently married No. 83, Ap-pet-tah-pe, a Sac and Fox woman, about this time. The tribe from which he came is not shown.

81 No. 366, San-e-ke-a-shic, and No. 367, Mak-ko-see (wife), were also enrolled at this time, and were carried on the rolls until 1890, and then dropped because the chiefs and headmen contended they were Pottawatomie Indians, and not entitled to enrollment.

Paragraph 6 (a). A statement of the total amount of moneys realized from the disposal of land of the confederated tribes of Sac and Fox Indians of the Mississippi, under the treaty of 1859, between said Indians and the United States; the disposition made of said money; how much of the same was disbursed for the branch of the tribes in Kansas, and how much for the branch of said tribes in Iowa.

Answer. The records of this Office do not show how much money was realized from the sale of the Sac and Fox of the Mississippi lands under the treaty of 1859. The annual report of the Commissioner of Indian Affairs for 1865 (page 549) contains a statement of the amount received for the lands paid for in cash or certificates, aggregating \$282,439.27. These figures can not be verified by the ledgers, but no doubt the information can be obtained from the records of the General Land Office. The records here show that \$905.15 was received from the sale of said lands from 1869 to 1870.

There being no record of the receipts on the ledgers here the expenditures thereunder are not ascertainable. The report above referred to, however, contains a statement of how the money was used.

In a communication from this Office, dated November 20, 1894, to J. M. Vale, attorney for the Sacs and Foxes in Iowa, it was reported that "from 1852 to 1867 the records of this Office fail to disclose the fact that any expenditures were made for the Sacs in Iowa." (See Senate Misc. Doc. 48, 53d Cong., 3d sess., p. 11.)

Paragraph 7. The date on which allotments of land were made to the Sac and Fox Indians of the Mississippi in Oklahoma.

Answer. The Schedule of Allotments was approved by the Secretary of the Interior September 4, 1891.

Paragraph 8. The amount of money now to the credit of the Sac and Fox Indians of the Mississippi in Oklahoma, as shown by the records of the Indian Office.

Answer. There is now to the credit of the branch of the Sac and Fox Indians of the Mississippi in Oklahoma, the following amounts:

Sac and Fox of the Mississippi fund (treaty of 1867) . . .	\$12,164.96
Sac and Fox of the Mississippi in Oklahoma fund (agreement of Feb. 13, 1891)	207,688.61
Balance of interest on both funds	25,513.02
Fulfilling treaties with Sacs and Foxes of the Mississippi	1,494.74

Paragraph 9. Copy of report of the Acting Commissioner of Indian Affairs dated June 28, 1906, to the President, on bill H. R. 10133, concerning claims of the Sac and Fox Indians in Iowa, and for other purposes.

Answer. Copy of said report is herewith inclosed.

Request of May 31, 1907.

Paragraph 1. For copies of the correspondence or papers showing what, if any, proceedings or action were taken by the Commissioner of Indian Affairs, as required by article 7 of the treaty of 1859

(15 Stat., 467), to notify absent members of the tribes of said treaty of agreement.

Answer. The records of that period are so incomplete as to details that the Office is unable to say what, if anything, was done
82 in the matter. An examination, as thorough as could be made at this time, fails to disclose any action of the kind indicated, but this is not conclusive evidence that there was none, as experience has shown that the old records are not altogether reliable.

Paragraph 2. For the printed roll of the Sac and Fox Indians of the Mississippi in Iowa, prepared by Duren J. H. Ward, which was filed in the Office of Indian Affairs in December, 1906, by the attorney for the claimant Indians for consideration in connection with their claims, when the same were under investigation under the directions of the President of the United States.

Answer. Desired roll, printed in pamphlet entitled "Meskwakia and The Meskwaki People (Tama County, Iowa) by Duren J. H. Ward," is herewith inclosed.

Very respectfully,

C. F. LARRABEE,
Acting Commissioner.

WASHINGTON, Jan. 13, 1863.

DEAR SIR: I have the honor to enclose you a communication from the Governor of Iowa, with an accompanying report of Geo. L. Davenport, Esq., in reference to the Fox Indians in Tama Co., Iowa, to which I request your early attention.

Very respectfully, your ob'dt servant,

(Signed)

JAMES W. GRIMES.

Hon. Wm. P. Dole, Com. of Indian Affairs.

EXECUTIVE OFFICE, IOWA,
IOWA CITY, Nov. 5th, 1862.

DEAR SIR: Enclosed please find copy of report made me by Geo. L. Davenport relative to Fox Indians now settled in Tama Co. in this State. Please use your influence to have their annuities in arrears paid them here, and at earliest practicable day.

Mr. Davenport was appointed by me to examine into the condition of these Indians and his statements entitled to credence. Your early attention will oblige.

Your ob't serv't,

(Signed)

SAMUEL J. KIRKWOOD.

Hon. J. W. Grimes, Burlington, Iowa.

DAVENPORT, Sept. 26, 1862.

DEAR SIR: I have just returned from the Fox village in Tama Co. I found the Indians very uneasy for fear that some of their people might be killed while out hunting in mistake for Sioux. They have therefore been obliged to keep within the settlements where they are known. They gave me every assurance of a friendly feeling towards the whites. They say they have been treated with

a great deal of kindness by the inhabitants of Tama County, who have often supplied them with provisions when their families were in a starving condition. This little band of Fox Indians returned from Kansas Ter. eight years ago and brought with them Eight hundred Dollars saved out of their annuities for that year, 83 with which together with eight horses they purchased a tract of land, which is held in Trust for them by the Hon. J. W. Grimes at that time Governor of the State. They were allowed to settle in this County by the inhabitants petitioning the Legislature, who passed an act allowing them to do so. Since their settlement here they have supported their families by raising corn, beans, &c., and what game they could find which is getting very scarce owing to the thick settlement of the country.

These Indians request me to say to your excellency that they are fearful that their families will perish during the coming winter as they are unable to go to their usual hunting grounds on account of the alarm among the people caused by the outbreak of the Sioux in Minnesota. They hope your excellency will assist them. They have not received any of their annuities for seven years and of which they are justly entitled to, as they are required to take all the members of each family to the agency in Kansas Ter. to receive it. The distance being very great they are not able to do so. They suppose their share of the annuities have been set aside for them. They number Sixty nine men, Sixty five women and fifty-one children. They beg your excellency to intercede for them with their Great Father at Washington that their share of the annuities may be paid to them here through your excellency's hands. This would enable them to support themselves and help to get more of their land in cultivation and thereby prevent them from being a burthen upon the State or its citizens. I have assured the people as much as possible that there is nothing to fear from these Indians and I think the panic will soon pass away. I am of the opinion that the condition of these Indians might be greatly improved by a little assistance and advice.

I remain yours very respectfully,

(Signed)

GEO. L. DAVENPORT.

To His Excellency, Gov'r Kirkwood.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
WASHINGTON, June 28, 1906.

SIR: In my interview with you on yesterday in regard to enrolled bill entitled "An act for the annual pro rata distribution of the annuities of the Sac and Fox Indians of the Mississippi between the two branches of the tribe, and to adjust the existing claims between the two branches as to said annuities," which is now before you for action, I suggested that I had based my recommendation that the bill be not approved entirely on the views of Mr. Commissioner Leupp, as expressed in a memorandum which I laid before you, also in a letter to the Secretary of the Interior, dated May 11, 1906,

printed in House Document No. 805, present Congress, whereupon you orally directed me to personally examine the subject and to report to you by 11 o'clock this morning what my individual views are concerning the merits of the measure.

In pursuance of your direction I called to my aid two financial clerks and three lawyers of the Office Staff, and made as careful a study into the history of the claims as the limited time would permit.

The records, papers, and correspondence are voluminous, so that when, in 1895, an investigation of the claims was made by experts of the Department, under direction of the Secretary of the Interior and by authority of Congress (Act of March 2, 1895), it required several months of careful research and consideration to prepare and present a report upon which an adjustment of the claims of the Iowa branch of the tribe was made; hence the difficulty in carefully looking into the whole case will be apparent to you.

In the examination I have been able to make, including the House Committee report—a strong presentation of the case on the side of the Iowa branch—I find nothing to warrant the withdrawal of the recommendation I made on June 25, 1906, that the bill be not approved, because I feel that there is reasonable doubt of the justice of the claim, but I do not go so far as to say that these claimants may not be able to support their case, at least in part, if presented before a judicial tribunal, but if they are not just, the passage of this act would cause an irreparable injury to the members of the Oklahoma branch. On the other hand, if this bill should not be approved, there will be time between now and the next session of Congress for thorough investigation by some officer of the Interior Department, giving both sides a chance to be heard and to present their contentions, by counsel if necessary, and if it should be developed by the investigation that these claims are meritorious, the Office would certainly not object to the enactment of legislation similar to the bill under consideration, but would gladly recommend it.

Very respectfully,

(Signed)

C. F. LARRABEE,
Acting Commissioner.

The President.

TREASURY DEPARTMENT,
WASHINGTON, Sept. 6, 1907.

SIR: The request of the Court of Claims for information in case No. 29994, The Sac and Fox Indians of the Mississippi in Iowa vs. The United States, referred by you to this office on May 13, 1907, is returned with the following information:

There has been disbursed by agents at the agency, in Oklahoma, for the Sac and Foxes of the Mississippi from January 1, 1900, to June 30, 1907, as shown by "Exhibit B2" herewith..... \$249,512.98

By claims as follows:

Per capita annuities	\$4,395.06
Services and supplies	2,576.87

Board and lodging and railroad expenses of delegations to Washington	979.75	
Salaries of officials of tribal government..	834.88	
		<hr/> 8,786.56
Total		258,299.54
There has been disbursed by the agent for the Sac and Foxes of the Mississippi in Iowa for the same period, as shown by "Exhibit C2"		126,071.10
By claims as follows:		
Per capita annuities	7,668.42	
Board, lodging, and traveling expenses of delegations to Washington	63.33	
		<hr/> 7,731.75
Total		133,802.85

Respectfully,

J. B. BELT,
Acting Auditor.

The Comptroller of the Treasury.

85

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *October 19, 1907.*

SIR: I transmit herewith, in answer to the call from the court, dated July 25, 1907, such information as can be obtained from the records now to be found in the Indian Office, in the matter of the claim by the Sac and Fox Indians of the Mississippi in Iowa vs. The Sac and Fox Indians of the Mississippi in Oklahoma, under the treaty of 1859, the call being for—

"A statement of the total amount of money realized from the disposal of land of the confederated tribes of the Sac and Fox Indians of the Mississippi, under the treaty of 1859, between said Indians and the United States; the disposition made of said money; how much of the same was disbursed for the branch of the tribes in Kansas, and how much for the branch of the tribes in Iowa."

A further search has been made of the files of the Indian Office disclosing a statement made October 31, 1865, by D. N. Cooley, Commissioner of Indian Affairs, to Perry Fuller, a certified copy of which is transmitted herewith. This statement shows the total number of acres that were sold, the amount received in cash and the amount represented by certificates of indebtedness; the amount of the certificates that were redeemed in cash and the amount of those surrendered for land, etc. The figures contained in this statement agree with those shown in the report of the Commissioner of Indian Affairs for the year 1865, page 549.

By this statement it will be observed that the receipts from the sale of these lands, both in cash and scrip, did not equal the amount of the tribe's indebtedness by \$26,574.59. Reference to the treaty of 1867 (15 Stats. L., 495) and article 3 thereof shows that the United States agreed to pay the amount of the outstanding indebtedness of the Sac and Fox tribe, represented by scrip issued under the

provisions of previous treaties "and amounting, on the first of November, eighteen hundred and sixty-five, to twenty-six thousand, five hundred and seventy-four dollars, besides the interest thereon."

Subsequent to the making of the report herein referred to, there was received the further sum of \$945.15 during 1869 and 1870, as shown by the ledgers (not \$905.15 as reported in the report of July 13, 1907). Add to this the \$160 balance deposited in the Treasury and we find, as shown by the ledgers, \$1,105.15 above the amount disbursed in settling the indebtedness of the tribe. Of this amount there was disbursed:

Oct. 14, 1865, to John H. Wright.....	\$45.00
Aug. 31, 1870, to Interior Department transfer account being amount paid to Sup't Murphy on settlement of his accounts	75.48
Dec. 8, 1871, to Treasurer U. S. internal revenue tax.....	1.02
Oct. 4, 1873, drawn by C. Delano, Sec'y and Trustee for investment	983.65
	<hr/> 1,105.15

By reference to the report of the Commissioner of Indian Affairs for 1873, page 349, it will be seen that the Secretary of the Interior invested the \$983.65 in U. S. bonds, loan of 1865.

How much of the amount realized from the sale of the land, if any, was disbursed for the benefit of the Sac and Fox who located in Iowa the Department is unable to determine. By reference to Senate Document No. 167, 54th Congress, 1st session, last paragraph on page 10, the Department reported that a part of the migratory band of the Sacs and Foxes remained on the reservation as late as 86 the year 1866—small parties of them separating from the main body in each of the years from 1862 to 1866, inclusive—and there being no record or evidence by which this indebtedness (meaning the unpaid balance of the outstanding scrip under the treaty of 1859, amounting to \$26,574.59) can be accurately apportioned among individuals or the several sections of the tribe. It is only fair to assume that if any of the Iowa Sac and Fox band resided on the reservation up to 1866 they must have incurred their share of the tribe's indebtedness in Kansas.

The Secretary of the Interior, acting as trustee for the trust lands of the Sac and Fox Indians in Kansas under the treaty of 1859 rendered an account of the transactions thereunder to the accounting officers of the Treasury, showing in detail, I believe, the source of receipts and the manner of disbursing them. If, therefore, this report is not considered as being full and explicit enough, I would respectfully suggest that the trust account of the Secretary of the Interior covering the period of the sale under the treaty of 1859, and which are no doubt on file in the Treasury Department, be examined for further information.

Very respectfully,

THOS. RYAN,
First Assistant Secretary.

The Clerk of the Court of Claims.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
WASHINGTON, Oct. 14th, 1907.

I, C. F. Larrabee, Acting Commissioner of Indian Affairs, do hereby certify that the paper hereto attached is a true copy of the original as the same appears of record in this office.

In testimony whereof, I have hereunto subscribed my name, and caused the seal of this Office to be affixed, on the day and year first above written.

[SEAL.]

C. F. LARRABEE,
Acting Commissioner.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
WASHINGTON, October 31, 1865.

SIR: In reply to your inquiries under date of the 26th inst., in relation to the claims allowed against the Sac & Fox of Miss. Indians, the payment thereof, and the authority for paying interest on the scrip issued, etc., etc., you are respectfully informed that the accompanying tabular statement will give you the information desired respecting the total sum allowed against said Indians, the amount paid, and the balance outstanding up to this date.

The whole amount allowed to traders under the treaty of 1859 is \$157,150.81, which was audited and awarded by a commission of which you are a member and recommended to be paid, except a bill of \$1,609.29 presented by J. H. Lockwood some time subsequent, which, with the evidence, was duly examined by the Commissioner of Indian Affairs, who considered the account a just one, and recommended its payment, which action was approved by Mr. Usher, the

Secretary of the Interior.

87 Although no interest was allowed on, or mentioned in, the "traders scrip," the holders thereof alleged that in consequence of an act of Congress of July 17, 1862, withdrawing from sale the lands of said Indians, they were deprived of the power of realizing the money due upon said scrip, and on the application of Hon. Hugh McCulloch (who was a large holder thereof) Secretary Usher, on the 4th day of November, 1864, decided that interest should be allowed upon Mr. McCulloch's scrip from July 17, 1862, to the date of its surrender; and this Office applied this decision to all the outstanding scrip, and upon its presentation for redemption, interest was accordingly added.

In regard to the interest on the "Stevens improvement scrip," I will add that upon a final settlement with Mr. Stevens it was found that a large amount of money was due him, and there being no funds to pay the same he agreed to receive and accept certificates, in which six per cent. interest was included, and the whole transaction having been sanctioned by Secretary Usher, the settlement was thus concluded. Although I have no special data to form a decided opinion on the subject, I infer that the Commissioner of Indian Affairs approved of allowing interest on the certificates to be

issued, on the ground that the contract for making the Sac and Fox improvements was predicated upon a *cash* basis, one-half payable at a certain period of the prosecution of the work and the remainder on the final completion of the contracts and its approval by the Government agent appointed to examine the improvements and to decide upon the fulfillment of said contracts. Mr. Stevens having performed his part of the agreement (the work having been examined and accepted by Special Agent Brady), and this Office being unable to make the payments as before stated, the Secretary of the Interior and the Commissioner of Indian Affairs at that time determined to allow Mr. Stevens legal interest on that part of the debt remaining unpaid and for which he accepted certificates of indebtedness issued by this Office.

Very respectfully, your obedient servant,

D. N. COOLEY,
Commissioner.

Perry Fuller, Esq., Washington, D. C.

Statement of the Sales of the Sac and Fox of Mississippi Trust Lands, Amount Received Therefor, and the Amount of Outstanding Indebtedness.

Number of acres originally offered for sale.....	278,332.60
Number of acres, diminished reserve, offered for sale..	61,500.00
	<hr/>
	339,832.60
Number of acres sold	268,502.68
	<hr/>
Number of acres unsold.....	71,329.92
	<hr/>
Whole amount of sales	\$282,439.27
Cash received	\$153,664.55
Certificates received in payment of land..	128,774.72
	<hr/>
	282,439.27
	<hr/>
Certificates redeemed in cash	153,461.55
Certificates surrendered for land payments.....	128,774.72
Amount of bill paid	43.00
Cash in Treasury to balance.....	160.00
	<hr/>
	282,439.27
	<hr/>
88 Amount of traders' scrip issued... \$157,150.81	
Amount of principal redeemed... 144,044.76	
	<hr/>
Amount of principal outstanding.....	\$13,106.76
Amount of principal Stevens scrip issued. 114,671.68	
Amount of principal redeemed..... 101,203.85	
	<hr/>
	13,467.83
	<hr/>
Whole amount of scrip outstanding.....	26,574.59

Amount of traders' scrip redeemed.....	144,044.76	
Amount of interest paid	21,564.76	
Amount of Stevens scrip redeemed.....	101,203.85	
Amount of interest paid	15,422.92	
		<hr/> 282,236.27
Whole amount of scrip and interest paid.....	282,236.27	

(Indorsed:) 29994. Sac & Fox Indians of the Mississippi in Iowa v. The U. S. Reply of Interior Dept.

TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
WASHINGTON, November 25, 1907.

SIR: I have the honor to acknowledge the receipt of an order of the court of November 4, 1907, entered in the case of The Sac and Fox Indians of Mississippi in Iowa vs. The Sac and Fox Indians of the Mississippi in Oklahoma and The United States, requesting certain information stated in claimant's motion.

In reply to the request, find herewith copy of report of the Auditor for the Interior Department of the 13th instant, from which it appears that the information requested is not in his Office.

The Comptroller of the Treasury, in his reference of the order to this Office, stated that there is no information on the subject in his Office.

Respectfully,

J. H. EDWARDS,
Assistant Secretary.

The Chief Justice, Court of Claims.

TREASURY DEPARTMENT,
WASHINGTON, November 13, 1907.

SIR: The request of the Court of Claims, dated November 4, 1907, for information to be used in case No. 29994, The Sac and Fox Indians of the Mississippi in Iowa vs. The Sac and Fox Indians of the Mississippi in Oklahoma and The United States, referred by you to this Office on the 8th instant, is returned with the following information:

The accounts of Secretaries John O. Usher (settlement 6985 of 1872) and James Harlan (settlement 7038 of 1872) show the disbursement of \$282,459.27 upon certificates of indebtedness and Stevens's scrip, issued by the Commissioner of Indian Affairs, but afford no information concerning the amounts of either tribal or individual debts, nor the date they were incurred.

The certificates of indebtedness recite, substantially, that the requirements of Art. 5 of the treaty of October 1, 1859, were complied with, as will appear by the report of the superintendent of Indian affairs of the central superintendency and the agent for the
89 Confederated Tribes of Sacs and Foxes dated February 2, 1861, said report being revised and corrected by the Secretary

of the Interior as appears by his letter dated March 9, 1861, to the Commissioner of Indian Affairs.

The report above referred to, probably on file in the Interior Department, should afford the desired information.

Respectfully,
(Signed)

R. S. PERSONS, *Auditor.*

The Comptroller of the Treasury.

Western Union Telegraph Company.

(Telegram.)

TOLEDO, IOWA, Nov. 13, 1906.

To Larrabee, Acting Commissioner, Washington, D. C.:

Unable to find any record of Indian census.

CHAS. BENISH, *Clerk.*

TERRITORY OF OKLAHOMA,
County of Lincoln, ss:

On this 7th day of November, A. D. 1906, Mah-ko-sa-toe deposes and says that he has been the principal chief of the Sac and Fox tribe of Indians for about twenty-one years; that he is now seventy-two years old. Deponent says that he has a full recollection of the history of the tribe from a short time before they left their reserve in Tama County, Iowa, up to the present time; that when the tribe moved from Iowa to Kansas this deponent was about twelve years of age. That after the tribe had been settled on the Kansas reservation for several years it was found that there was a progressive party among them that was in favor of schools, of the white man's dress, and of civilization generally. The opposing faction was not in favor of schools, and so determined and bitter were their feelings in regard to the education of their children and the adoption of the ways and dress of the whites that when the matter was pressed, on or about the beginning of the civil war, one of the subordinate chiefs, Maw-men-wau-me-cah, refused to join the majority of the tribe and left the Kansas reservation, with about ten families, and eventually went back to the former reservation in Tama County. Neither this chief nor any of the families who followed him returned to the Kansas reservation. Afterwards, families related to those who had already gone, and other disaffected families, followed from time to time to Iowa. Maw-men-wau-me-cah was not only opposed to the establishment of schools on the Kansas reserve, but he was bitterly opposed to the treaty under which the Iowa reservation was ceded to the Government and the Kansas reservation provided for. He was one of those who at first refused to go to Kansas and burdened the Government with the removal of the Indians. After he and his families reached Kansas they refused to go on the reservation provided for the tribe, and staid with the Kickapoos some two or three years.

Maw-men-wau-me-cah's band were largely of the Foxes.
90 There were but few if any of the Sacs. But his band did not embrace all of the Foxes belonging to the Sac and Fox tribe,

but did probably embrace something more than one-half. After Maw-men-wau-me-cah left with his families the Foxes remaining in the tribe chose for their chief Che-ko-skuck, one of their own number, whose selection was confirmed by the council and who remained as the chief of the Foxes on the Kansas reservation, and after the tribe had removed to the Indian Territory, and up to the time of his death. At the time of the death of Che-ko-skuck there had been another organization of the whole tribe and there was no occasion for selecting a special chief for the Foxes or for any special division or portion of the tribe. Che-ko-skuck died *on* or *about* 1890. There are now from thirteen to sixteen families of Foxes among those residing on the Oklahoma reservation, and one Fox, Edward Mathews (whose Indian name is Pe-pe-quah), is a member of the present council. Mathew's father was To-ke-kush.

That immediately preceding the departure of Maw-men-wau-me-cah and his followers, *on* or *about* 1861, there was a payment of annuities. These Indians were on the roll and all of them received their share of the annuity money and carried it away with them. And deponent further says that while he can not name the Iowa parties who returned to the Kansas agency from time to time from Iowa and drew their annuity, yet he knows it is a fact that a number of them did this, and continued it as a practice from year to year. There is one instance in the memory of deponent where an Indian by the name of Me-shu-ma-ne left the agency some time *on* or *about* 1864 and that he returned again to the agency and from time to time drew annuity payments, his last drawing being in 1872. After the last-named year this man returned to Iowa having with him two other Sac and Fox Indians, namely Na-hah-shee and Quin-a-paw, and so far as this deponent knows neither of these Indians ever returned to the agency.

Deponent further says that there have been no persons adopted into the tribe since about fifteen years ago. That previous to that time there were by the customs of the tribe two methods of adopting citizens, one by intermarriage and the other by direct action of the council. It is the recollection and belief of the deponent that but comparatively few names were added to the lists by reason of adoption. Under the provision for intermarriage, if either a woman or a man who was not a Sac or Fox married into the tribe and lived with his or her husband or wife for a term of one year, his or her name was then put upon the roll and the individual became from that time forward to all intents and purposes a member of the tribe. But in case of such adopted citizen becoming divorced or for other reason leaving his or her husband or wife and the facts coming to the attention of the council the name was stricken from the rolls. Deponent remembers several names which were thus added to the rolls and subsequently stricken off. Deponent further says that it is his belief that there are no names on the present roll but what are entitled to be there as Indians having Sac or Fox blood or Indians who are descendants of adopted citizens; that is, deponent believes that the present roll is free from any illegal names.

Further deponent testifies and says that he never heard any com-

plaint made against the healthfulness of the reservation in Kansas. He remembers distinctly the controversy concerning schools and the adoption of the white man's ways, but is perfectly certain that at that time no question of the unsanitary conditions surrounding the Indians was talked about. He is sure, in other words, that the sole reason given by the discontented party for returning to Iowa was as above set forth.

In 1896 this deponent was principal chief and Moses Ke-o-kuk second chief of the tribe. During that year a delegation was made of deponent and said second chief to proceed to Washington and oppose the claim made by the Iowa Sac and Foxes. Deponent and Ke-o-kuk were accompanied by William Hurr as interpreter. They were not permitted to employ counsel, but presented their claim through the interpreter before the committees of Congress, and eventually, when upon a report made by the Commissioner of Indian Affairs it was determined to pay the Iowa Indians the sum of forty-two thousand eight hundred ninety-three and 25/100 (\$42,893.25) dollars, this deponent and all of his people on the Indian Territory reservation withdrew all opposition thereto with the understanding had with the Bureau of Indian Affairs that that should forever settle all claims between the two contending divisions of the tribe, and that the Iowa Sac and Foxes would not thereafter make any claim for funds or annuity. Deponent says that said second chief (Moses Ke-o-kuk) has since died, but that he had frequently talked it over with him and knows that it was his understanding as herein stated, as well as that of deponent.

CHIEF McKOSITO, his (x) mark.

(Indian name Mah-ko-sa-toe.)

Dated at Sac and Fox Agency, Oklahoma, November 7, A. D. 1906.

The foregoing was duly subscribed and sworn to before me on this 7th day of November, A. D. 1906, after having first been interpreted into the Indian language by a competent interpreter, all interlineations, additions, and corrections being made before signing.

[SEAL.]

HARRY L. ELSMLIE, *Notary Public.*

My commission expires 10-11-08.

TERRITORY OF OKLAHOMA,

County of Lincoln, ss:

I, Alex. Connolly, acting interpreter for the Sac and Fox Tribe of Indians in Oklahoma, on oath depose and say that I have this 7th day of November, A. D. 1906, carefully and accurately interpreted into the Sac and Fox Indian language the attached affidavit of Mah-ko-sa-toe, chief of said Sac and Fox Tribe of Indians in Oklahoma, and am fully satisfied that he thoroughly understands the nature, contents, and purport of said affidavit.

ALEX. CONNOLLY,

Member of Sac and Fox Council and

Acting Interpreter to said Council.

Subscribed and sworn to before me this 7th day of November, A. D. 1906.

[SEAL.]

HARRY L. ELMSLIE, *Notary Public.*

My commission expires 10-11-08.

92 TERRITORY OF OKLAHOMA,
County of Lincoln, ss:

On this 7th day of November, A. D. 1906, the undersigned, second chief of the Sac and Fox Tribe of Indians in Oklahoma, to wit, David Wakolle, and Councilors Logan Kakaque (Ka-ka-que), Edward Mathews (Pe-peque), Edgar Mack (Kan-waw-so), Alex. Connolly (Waw-waw-to-sah), Walter Battice (Pah-me-waw-tha-skuk), and Frank Carter (Quah-quah-se-sah), each for himself deposes and says that he was present when the principal chief, Mah-ko-sa-toe, made and duly signed and swore to the foregoing affidavit. That they each heard it interpreted to the said deponent, and are aware of its contents. That most of the statements therein set forth are within the knowledge of these deponents and are true. That all other statements contained in said affidavit they believe to be true. That practically all the statements therein made by the said chief are common history among the tribe.

The second chief and first two members of the council above named are respectively aged sixty-four, sixty-seven, and sixty-one years. That the memory of these three deponents covers nearly all the time and all the events set out by the principal chief, and these are hereby corroborated by them from personal knowledge. The other four members of the council above named, and in the order given, are respectively of the following ages, to wit, fifty-five, fifty-four, forty-six, and thirty-eight years.

DAVID (his x mark) WAKOLLE,	<i>Second Chief.</i>
LOGAN (his x mark) KAKAQUE,	<i>Councilman.</i>
EDWARD (his x mark) MATHEWS,	<i>Councilman.</i>
EDGAR (his x mark) MACK,	<i>Councilman.</i>
ALEX. CONNOLLY,	<i>Councilman.</i>
WALTER BATTICE,	<i>Councilman.</i>
FRANK CARTER,	<i>Councilman.</i>

Witnesses to marks and signatures—

HARRY L. ELMSLIE.

W. C. KOHLENBERG.

Attest:

ALEX. CONNOLLY,

*Member Sac and Fox Council, and
Acting Interpreter to said Council.*

Subscribed and sworn to before me this 7th day of November, A. D. 1906.

[SEAL.]

HARRY L. ELMSLIE, *Notary Public.*

My commission expires 10-11-08.

93 DISTRICT OF COLUMBIA,
City of Washington, ss:

Jonas M. McGowan, being first duly sworn, deposes and says that he is a member of the law firm of McGowan, Serven, and Mohun, of Washington, D. C., who are at the date hereof the attorneys of the Sac and Fox tribe of Indians located in the Territory of Oklahoma; said firm being employed in pursuance of a contract with said tribe, which contract is duly approved by the Commissioner of Indian Affairs and by the Secretary of the Interior; that said firm were so employed to aid the Indians in defending against what is known as the claims of the Iowa band of Sacs and Foxes, as the same is set forth in Report No. 3022, House of Representatives, 59th Congress, 1st session.

Deponent says that as a member of said firm he visited the agency of said Sac and Fox Indians in Oklahoma, on the 3d, 4th and 5th days of November, ultimo. At his request the members of the council were called to the agency for consultation. There were present the principal chief, Mah-ko-sa-toe (now known as McKosito), the second chief, David Wakolle, and councilors Logan, Kakaque, Edward Mathews, Edgar Mack, Alex. Connolly, Walter Battice, and Frank Carter. Deponent was informed that the entire council is made up of the two chiefs and eight councilors, two of these latter being absent at said consultation. Deponent further says that three member- of the counsel who were present, to wit: Alex. Connolly, Walter Battice, and Frank Carter, were educated in the white man's schools and spoke and wrote the English language, Alex. Connolly acting as interpreter between deponent and the other members, who did not speak English.

Deponent says that he fully and carefully explained to said chiefs and councilors that his object was to learn from them the facts relating to the claim made by the Iowa band, as they understood or had personal knowledge of the same, and if it was disclosed that their knowledge or information threw light upon the controversy, that he would ask them for affidavits covering the same. The result of said interview and of the several questions deponent put to said chiefs and councilors is embodied in the attached and preceding affidavits. (Exhibits A and B.)

Deponent further says that he found the said chiefs and council composed apparently of sober, sedate, intelligent, and honest men. They occasionally asked that such and such statement should not be "put down," because they were not certain concerning it. There was no appearance of any disposition to enlarge a statement that made against their opponents, but every appearance of a desire to adhere to the rigid truth as they remembered it or understood it.

Deponent further says that he had previously, and during the lifetime of the late Chief Keokuk, acted as attorney for said tribe, and that during such previous employment he discovered that the tribe then residing on the present reservation was divided, as to its own internal affairs and as to its dealings with the United States, into two parties, one of which was in favor of schools, of missions, of the white man's dress, and the things generally that led to better living and to civilization; while the other party was opposed to all these. The

party of progress was evidently led by Keokuk, the son of the
94 Keokuk who, as chief of the Sacs, signed all the treaties between his tribe and the United States, from the treaty of Fort Armstrong, in 1822, to the treaty of 1842, in which the Sacs and Foxes ceded all their lands west of the Mississippi River and agreed to move within three years to a new reserve to be selected in the then "Indian Country," afterwards the Territory of Kansas, which latter treaty was signed by both old Keokuk, as the principal chief of the Sacs, and by his son, Keokuk, jr. The two Keokuks were, one or both, the chosen chiefs of the Sacs and the Sacs and Foxes for eighty years or more. They were always at the head of the progressive element of their people, and were the consistent and continuous friends of the United States Government. This the United States recognized, so far as the elder Keokuk was concerned, in article 2 of the treaty of 1832 (7 Stat., 347; Kappler, 349); again in article 4 of the treaty of 1837 (7 Stat., 540; Kappler, 495); and his energy and promptness in carrying out treaty obligations were commended by Governor John Chambers, of Iowa, who referred to the removal of the Indians from the State under the treaty of 1842 in the following terms:

"The time stipulated by the treaty of October, 1842, with the Sacs and Foxes for their final removal from the lands ceded by them to the United States will expire on the 11th of next month, and already a part of the Sacs, led by their energetic and talented chief, Keokuk, are on their way to the land west of the Missouri." Report Com. of Ind. Affairs, 1845, p. 34.)

Deponent says further, that from the various treaties made with the Sac and Fox Indians, and from the reports and records relating to them, and from his own knowledge, he is prepared to say that, to the best of his knowledge and belief, during all the years from 1804 to the present time, the Sacs have furnished most of the progressive and reliable element of the tribe. By this, deponent does not mean to say that all of the Foxes were nonprogressive and opposed to schools and the like. There was, as deponent is informed and believes, a division among the Foxes themselves, a portion of them desiring to act with Keokuk and the leading Sacs. This portion of the Foxes are now on the reservation in Oklahoma, one of them being a councilor, while those of the band who were determined to live the old, barbarous life broke away and are now in Iowa. That deponent feels and believes that this statement is not only corroborated by the allegations of the members of the tribe now on the reservation, but is abundantly borne out by the statements cited in the preceding brief, and found in the reports of the Commissioner of

Indian Affairs, made by the agents in charge of the Iowa band. And further this deponent saith not.

JONAS H. MCGOWAN.

Subscribed and sworn to before me, a notary public in and for the city of Washington, District of Columbia, this 11th day of December, A. D. 1906.

[SEAL.]

MYDDLETON WOODVILLE,

Notary Public.

95

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
WASHINGTON, *February 3, 1904.*

SIR: I have the honor to acknowledge receipt, by your reference of the 21st ultimo, of S. 3459, 58th Congress, 2d session, introduced by Senator Dolliver January 15, 1904, being a bill to provide for the annual pro rata distribution of annuities of the Sac and Fox Indians of the Mississippi between the two branches of the tribe, and to adjust the existing claims between said branches as to said annuities. The bill reads as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in the future distribution of the annual appropriations for the fulfillment of existing treaty stipulations with the Sac and Fox Indians of the Mississippi the Secretary of the Interior be, and he is hereby, directed, after deducting the five thousand dollars, or so much thereof as may be necessary, for the support of the manual labor school, as provided in article nine of the treaty of eighteen hundred and sixty-seven, to make a pro rata division thereof between the two branches of the tribe, one branch residing in the Territory of Oklahoma and the other branch residing in the State of Iowa, according to their respective numbers, to be ascertained by the annual enrollment of them.

"SEC. 2. That in order to settle and adjust the claims of that branch of the tribe residing in the State of Iowa, as set out in their memorial in Senate Document Numbered Sixty-four, Fifty-seventh Congress, second session, the Secretary of the Treasury is hereby authorized and directed to transfer on the books of the Treasury Department the fund of two hundred and fifty-two thousand and thirty-three dollars and thirty-three cents, now held by the Sac and Fox Indians of the Mississippi in Oklahoma, to the credit of that branch of said tribe now residing in the State of Iowa, and from the amount so transferred to pay the attorney employed by the said Iowa branch of said tribe under contract for the prosecution of said claims the fee agreed upon therefor by them in council, as set forth in their appeal to Congress printed in House of Representatives Document Numbered Thirty-eight, Fifty-seventh Congress, first session, also to pay therefrom to the principal chief of the Foxes of said tribe the sum of — dollars, to be accepted by him in full of his claim for all annual installments of the amount stipulated by treaty to be paid to said principal chief, and not heretofore paid to him. The balance due on the claims of the said Iowa branch of the tribe is hereby au-

thorized and directed to be paid to them by the Secretary of the Interior in annual installments of not less than seven thousand dollars, until the said balance of said indebtedness shall be fully discharged, from the proportion of the tribal annuities inuring to that branch of the tribe residing in the Territory of Oklahoma."

Under date of January 8, 1903, the Department referred to this office for report an amendment to be proposed by Senator Dolliver to the bill (H. R. 15804) making appropriations for the current and contingent expenses of the Indian Department, etc., for the fiscal year 1904. By reference to the report on this bill from this office, dated February 27, 1903, it will be observed that section 1 of the proposed amendment and section 1 of the present bill are very
96 similar, with one slight exception—the latter providing for deduction of \$5,000 for a manual labor school before making the distribution. This will be referred to later. Section 2, however, is totally different from the same section in the proposed amendment of last year, or the provisions of the prior act of March 2, 1895. (28 Stats., 903.)

The most noticeable difference is that authorizing the Secretary of the Treasury to deduct from the funds of the Oklahoma branch \$252,033.33 and credit the Iowa branch with that amount. The next noticeable feature is to pay the principal chief the sum of — dollars, in full for all claims for annual installments due by treaty stipulations. The last requirement is for the balance of the claim due the Iowa branch, and the Secretary of the Interior is authorized and directed to pay such balance in annual installments of not less than \$7,000, until fully discharged.

The bill, as proposed, is all for the benefit of the Iowa branch, and leaves no room for assuming that the Oklahoma branch may have a right to protest against its provisions. They are mandatory upon the Secretaries of the Treasury and the Interior, without affording the branch in Oklahoma an opportunity to be heard or to protest. How differently worded is this from the act of March 2, 1895, which gave a full and ample opportunity to the parties interested to be heard. The present bill employs the word "claims," which would lead the casual reader to believe that the "claims" had actually been before the Department for review, had been passed upon, and met with its approval. Their existence, however, thus far is only by the interpretation of the Iowa branch on the language of their treaties, and they have never been adjudged as legally due the claimants, either by this Office, the Department, or the Attorney-General for the Department.

By reference to Senate Document 64, 57th Congress, 2d session, which is the memorial of the Iowa branch, there will be found a full statement of the character of their claims and amounts, based upon a report made by the Secretary of the Treasury and contained in House Document No. 38, 57th Congress, 1st session, aggregating \$314,797.62, a proposal for a proportionate share of the amounts expended from treaty funds if, in the judgment of Congress, they are found to be due them. Compare the different items of this claim with those set up in their memorial presented to the 53d Congress,

3d session. (Senate, Miscellaneous Document No. 48.) They are practically the same, except in the matter of their proportion of the payment for lands, under the treaty of February 18, 1867, which in the present memorial has been omitted, as their shares were paid them under the decision of the Secretary of the Interior March 12, 1896, as shown by Senate Document 167, 54th Congress, 1st session. All their other claims, as shown by Senate Document 48 were rejected. In said Document No. 167 were given full reasons for rejecting the claim, and these same reasons exist to-day. No better or fuller report can be made by this Office. Their claim for their proportion of the amount of \$1,500, appropriated for physician and medicine, \$5,000 for manual training school, and \$5,000 for national government, is again introduced in their memorial submitted now. The opinion of the Assistant Attorney-General for the Interior Department, December 23, 1895, confirmed the action of the Secretary of the Interior dated January 1, 1886, when he decided that before any distribution of the \$51,000 was made to the Iowa branch, the amounts appropriated for physician, schools, and national government should be withheld for the benefit of the Oklahoma branch.

By reference to Senate Document 38, 57th Congress, 1st session, it will be seen that the principal chiefs of the two tribes were each paid \$500 annually, from 1855 to 1900. These chiefs were with their tribes on the reservation set apart for them by the United States. They had journeyed west from Iowa to Kansas, thence into Oklahoma with their tribes, and their acts were approved by the United States and the tribes, of which they were each the recognized leaders; while the so-called chief in Iowa had no voice in the council of the tribe proper, and had no influence over its future destiny and prosperity. The claimants, in their several memorials to Congress, have always contended that they are entitled to their proportion of the annuities of the tribe from 1855 to the date of their memorial. The Department has held that they abandoned such rights, and thereby forfeited them. Their proportionate share of the annuities was adjusted in 1884, according to their increase in numbers since 1867, and they have since received their 317/830 share of the same.

The act providing for readjustment July 4, 1884, (23 Stats., 85), reads, "That hereafter the Sacs and Foxes of Iowa shall have apportioned to them," etc., * * * "That this shall apply only to original Sacs and Foxes now in Iowa," etc. * * * The word "hereafter" fixes the date when the annuities should be apportioned. After all the clamor of the Iowa branch for back shares Congress said "hereafter," thereby, so it would appear to this Office, impressing its seal of disapproval of prior claims. What did Congress intend by inserting the words "only to original?" Was it meant to exclude those who might return after 1884? Partly so, no doubt; but in framing the act of July 14, 1884 (*supra*), it is evident that Congress intended it to be considered in connection with the act of March 2, 1867 (14 Stat., 507), which provided "That the band of Sacs and Foxes of the Mississippi now in Tamar (Tama) County, Iowa, shall be paid pro rata, according to their numbers, of the annuities, so

long as they are peaceful, and have the assent of the government of Iowa to reside in that State."

Those who had the assent of the government of the State of Iowa to reside there must be considered the "original." How many were there in 1856 when the assent of the State government was given in the act of its legislature, approved July 15, 1856? The act is as follows:

"SECTION 1. Be it enacted by the general assembly of the State of Iowa, that the consent of the State is hereby given that the Indians now residing in Tama County, known as a portion of the Sacs and Foxes, be permitted to remain and reside in said State, and that the Governor be requested to inform the Secretary of War thereof, and urge on said Department the propriety of paying said Indians their proportion of the annuities due or to become due to said tribe of Sac and Fox Indians.

"SECTION 2. That the sheriff of said county shall, as soon as a copy of this law is filed in the office of the county court, proceed to take the census of said Indians now residing there, giving their names and sex, which said list shall be filed and recorded in
98 said office; the persons whose names are included in said list shall have the privileges granted under this act, but none others shall be considered as embraced within the provisions of said act.

"SECTION 3. This act shall take effect from and after its publication in the Iowa Capital Reporter and Iowa City Republican, published at Iowa City.

"Approved, July 15, 1856.

"I certify that the foregoing act was published in the Iowa Capital Reporter July 30, and in the Iowa City Republican July 23, 1856.

"GEO. W. McCLEARY,
"Secretary of State."

(Report of the Commissioner of Indian Affairs, 1891, page 681.)

The number as shown in H. R. Document 38, 57th Congress, 1st session, by affidavit in 1855, was 144. This 144, with a very few additions, possibly, were in Iowa with the assent of the State government. Note the language of section 2 of the Iowa law, "but none others shall be considered as embraced within the provisions of said act." By the affidavit of Pa-Ha-She-Qua, H. R. Document 38, page 23, the number of Sacs and Foxes in Iowa was 310 in 1866, or 166 more than in 1855 or 1856, and that increased number was living in Iowa in violation of the said law and the act of Congress of 1867, if the construction put on the law by this Office is correct. The attorneys for the claimants have laid great stress on the Iowa act, and have quoted so much of it as suited their purpose, but the prohibitory clause has not been touched upon by them. Had this matter been fully presented to the Department when the number was to be ascertained in 1884, it is safe to assume that not only would the Department not have increased the number over that of 1867,

but would have reduced it to correspond with the intention of the Iowa act and subsequent acts of Congress, as herein referred to.

The original Sacs and Foxes in Iowa have, in the opinion of this Office, received more than their proportionate share of the funds due the tribe, and have divided with others who were violating their treaties, the laws of Iowa and the United States, and now they memorialize Congress to give them more of the funds of the Sacs and Foxes in Oklahoma, who, by prudence, thrift, and economy have preserved their patrimony undiminished to be eventually put into something substantial and solid, as a future monument to their industry and perseverance, an inheritance to their posterity. After years of toil and hardship seasoned with many deprivations, during which they have always obeyed their treaty stipulations, they are about to realize the fruits of their labor, and attain a civilization equal to the white man. If their funds are diminished by the present claim of the Iowa branch, it will naturally have a very disheartening effect upon them, and I respectfully urge that the bill do not have the approval of the Department, or its sanction for disturbing the present plan of distribution of the Sac and Fox fund of the Mississippi in Oklahoma; and I recommend that, before these claims are brought to a final issue, *that* the Oklahoma branch be given an opportunity to represent their interests in the matter. The bill is herewith returned

Very respectfully.

W. A. JONES,
Commissioner.

The Secretary of the Interior.

DEPARTMENT OF THE INTERIOR,
OFFICE OF THE ASSISTANT ATTORNEY-GENERAL,
WASHINGTON, *September 23, 1895.*

The Secretary of the Interior.

SIR: The petition of the chiefs and councilmen of the Sac and Fox tribe of Indians, asking that all unexpended balances of the annual fund of \$5,000 provided by the treaty, of 1867 for the support of their national government be paid over to their national treasurer, to be used as the national council may direct, which the Acting Secretary referred to me on the 26th ultimo for an opinion in the matter, has been carefully considered.

This fund is annually set apart from the income of the tribe in fulfillment of a stipulation in the ninth article of the treaty of 1867 (15 Stat., 496), which, as originally negotiated and agreed on between the parties, was as follows:

"* * * and after the settlement of the tribe upon their new reservation, the sum of ten thousand dollars of the income of their funds may be annually used, with the consent of the chiefs, under the direction of the Secretary of the Interior, for agricultural implements and assistance, purchase of stock, and otherwise in encouraging and assisting such of the tribe as will turn their attention to agriculture, and in support of their national government, for which last-mentioned purpose the sum of five hundred dollars shall

be annually paid to each of the five chiefs, two hundred dollars to each of ten councilors, two hundred dollars to their marshal, and the remaining three hundred dollars be subject to the disposal of the chiefs."

In the Senate this stipulation was amended so as to read as follows:

"* * * and after settlement of the tribe upon their new reservation the sum of five thousand dollars of the income of their funds may be annually used, under the direction of the chiefs, in support of their national government, out of which last-mentioned amount the sum of five hundred dollars shall be annually paid to each of the chiefs."

It seems that unexpended balances of this fund have from time to time been returned to the Treasury, and the petitioners ask that the sum thus accumulated be paid over to the treasurer of the tribe, and made subject to use by the national council.

Of the ten thousand dollars specified in the original stipulation, the sum of five thousand dollars was to be used, "with the consent of the chiefs, under the direction of the Secretary of the Interior, in support of their national government." But of this amount forty-seven hundred dollars were required to be used for the payment of fixed salaries of certain specified officials, and only three hundred were left for other purposes in support of the government. In this form the stipulation was extremely rigid. The amendment does not remove the fund from under the supervisory control of the Secretary and place it absolutely at the disposal of the chiefs, and such does not seem to have been the intention of the Senate. The intention seems to have been simply to make the stipulation more flexible—to enlarge the discretionary power of both the chiefs and the Secretary as to how the fund shall be used "in support of the national government"—to leave it to them to say how many salaried officials there shall be, and the amount of their salaries, except that each of

100 the chiefs, whatever the number, shall receive \$500 per annum—to allow them to otherwise vary the use of the fund "in support of the government" as may be made necessary from time to time by changes in the condition of the tribe. Every dollar of the fund is placed at the disposal of the chiefs, subject only to the limitation that it shall be used "in support of the government," and the requirement that \$500 shall be annually paid to each of the chiefs. But it is for the Secretary, and not for the chiefs, to say in each case whether the proposed disbursement is properly "in support of the government" in the meaning of this stipulation or not. And for this authority of the Secretary to be effectual it is obvious that the fund shall be retained in the custody of a disbursing officer of the United States, and by him disbursed only as directed by the Secretary.

The petitioners ask leave to use a portion of the fund to pay a teacher in the tribal school and an attorney for legal services for the tribe. Such disbursements might be for the general welfare of the tribe, and proper to be made by the chiefs from any tribal fund available for such purpose, but they would not be "in support of the

national government" in the meaning of this stipulation, and are therefore unauthorized.

I am of opinion that the duties with which the Secretary is charged in the premises, as herein indicated, preclude the granting of the request of the petitioners.

Herewith I return the petition and all accompanying papers.

Very respectfully,

JOHN I. HALL,
Assistant Attorney-General.

Approved.

HOKE SMITH, *Sec'y.*

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
WASHINGTON, *December 29, 1906.*

My DEAR MR. PRESIDENT: Agreeably to your instructions given personally to Acting Commissioner Larrabee and mentioned in the memorandum accompanying your veto of House bill No. 10133 last summer, I have made such a reinvestigation as was practicable of the respective rights of the Iowa and Oklahoma bands of the Sac and Fox Indians. Permission was granted the Oklahoma band to employ counsel, and the brief of their attorneys, Messrs. McGowan, Serven and Mohun, of this city, has been read by me, together with the brief of the attorney of the Iowa band, ex-Assistant Commissioner R. V. Belt. Both bands are ably represented by their legal advisers; but the reading of the two briefs convinces me more firmly than ever that neither the Congress nor the Commissioner of Indian Affairs ought to be called upon to decide a controversy which could be satisfactorily decided only by a competent court. I must therefore very respectfully repeat my plea that instead of attempting to adjudicate this matter under the forms of legislation, the Congress empower the Court of Claims to give both sides a full and fair hearing, and render judgment according to the legal and equitable rights of the two parties litigant as these may be developed. I make this appeal for several reasons, which I may briefly outline as follows:

(1) Experience has shown that wherever a case of this sort has been decided out-of-hand by the Congress the very efforts put forth by the members of that body to deal fairly by both sides, and on lines of practical rather than of technical justice, have produced results not acceptable to either side; because if a little less is given to the claimants than they have demanded they are sore over that, and if anything is taken from the defendants when they have insisted upon not giving up anything, they are sore, in their turn, over that. Moreover, a decision of a matter of this sort by the Congress is never a finality; an award made to-day may freely be ripped open to-morrow or next year or ten years hence. The mere fact that the Congress might insist that the beneficiaries of the award should sign a complete release would not of itself compel those beneficiaries or their descendants to remain quiescent. When the gentlemen now in Congress have passed out and others have taken their places the fight is liable to be renewed at any time, and the new Members who have to conduct it are bound

to be less familiar with the issues involved than the present Members. Not a session of Congress passes during which appeals are not made to this Office, as well as to Senators and Representatives directly, for the reopening of claims and awards supposed to have been finally settled and laid to rest years before. A decree of a court, on the other hand, does settle for good whatever it purports to settle at all; and for that reason I would ask that the present controversy be turned over to the Court of Claims with authority to settle it for all time, subject only to an appeal of the worsted party to the Supreme Court.

(2) In answer to one objection which may be raised to this suggestion—namely, that Congress is accustomed to refer controversies to the Court of Claims merely for the ascertainment of the facts, leaving the lawmaking body free to appropriate on the lines of the findings or not, and that therefore the reference of this Sac and Fox case to the court would still leave the Congress free to do what it pleased—I would request that the court be directed not simply to find the facts, but to pronounce judgment. I can understand the desire of the Congress to exercise its own prerogative, after the facts have been found, in any case involving the money of its constituents, the taxpayers of the United States, but in the case before us no interest of the taxpayers is involved; the only question at issue is whether a certain sum of money shall be paid by one band of Indians to another band of Indians, and the public interests will be unaffected no matter how the award may go. In other words, the taxpayers are in this instance merely spectators to a controversy waged between two groups of nontaxpayers over their own internal affairs.

(3) I do not consider myself a competent arbitrator in the present situation for two reasons: First, my natural tendency, other things being equal, would be to preserve the traditions of this Office in regard to any case presented to it. The attitude of the Office has uniformly been adverse to the claims of the Iowa band of Sac and Fox Indians; hence I should not feel that I was in a position to pass upon these issues with that judicial impartiality which ought
102 to be exercised in such cases. In the second place, throwing out this consideration entirely and regarding myself merely as a part of a great official machine, I should find myself called upon to decide whether a certain sum of money should be given up by one band of Indians who have honestly striven to carry out the policy and wishes of the Government, and to do what the successive Commissioners of Indian Affairs and Secretaries of the Interior have asked them to do, and pay it over to another band of Indians who have defied every wish of the Government and cast contempt upon its policy adopted solely for their benefit. It may be true that the recusancy of this latter band has been overlooked by the Department for the sake of peace, and because it was not quite sure of the extent of its own powers in the premises; that does not alter the fundamental facts. It may be true, also, that the nonprogressive Indians have so conducted themselves in Iowa as to avoid friction with the State authorities, and even that they have thriven more than their brethren of the Oklahoma band. These considerations do not affect

the general principle that our Government has for a number of years pursued a policy in dealing with its Indian wards which involved the dispersion of the tribes by placing the members thereof upon allotments of land patented to them in severalty, and encouraging them in certain habits of life and business styled the "ways of civilization." When a body of Indians have tried their best, possibly to their own physical disadvantage, to adapt their conduct to the policy thus pressed upon them, it seems to me that it would be a dishonorable thing for the Department to desert them when a controversy arises between them and an opposing faction whose persistent conduct has been the reverse of theirs.

(4) It is claimed by persons who have spoken to me in behalf of the Iowa band that if this dispute is carried into the Court of Claims on the terms I have suggested the Oklahoma band will be mulcted in about twice the amount which the vetoed bill awarded to them. This warning must mean one of two things: Either that the Court of Claims would give an improper judgment in favor of the Iowa band—an assumption which we could not afford to consider for a moment—or else that the Oklahoma band owes to the Iowa band twice as much as the bill in question called for. Now, my sole object in this whole affair is to procure not favors to either party but absolute justice to both; and I am sure, Mr. President, that your position in the matter is the same. If it be true that on any fair award the Iowa band would receive twice the amount that the bill proposes to give them, then why, pray, should they be held down to the amount in the bill? Let them have all that honestly belongs to them. I am here as the friend of all Indians; and although I could not voluntarily step out of a path well beaten by my predecessors in order to give to a recalcitrant band money which an obedient band insisted belonged to themselves, every instinct of fairness would prompt me to urge that this matter be laid before a tribunal competent to judge between the parties in interest, and that the money go, regardless of their previous conduct or any other such consideration, to the band to whom it is due.

(5) Assuming that the Congress, with its abundance of good lawyers and its general disposition to do justice between contending parties, should essay to settle this business by sitting as a quasi court of equity, I assert that there would be a pitiful disparity of representation as between the two bands when they came to present their respective pleas to this legislative tribunal. As 103 is perfectly natural, the Iowa delegation espouses the cause of the Iowa Indians; and no fair-minded critic will quarrel with them for taking this position. For like reasons, the Territorial Delegate from Oklahoma would, I am bound to suppose, take a similar interest in the Oklahoma Indians. But look at the difference! On the one hand, prepared to fight the battle for the claimants, stands a delegation universally admitted to be, in prominence, ability, experience, learning, familiarity with the laws and with legislative methods, the strongest for its size in the whole lawmaking branch of the Government, and embracing two Senators and eleven Representatives—13 men, all members of the dominant political party. Opposed to this group and upholding alone the cause of the defendants from whom

it is proposed to take the money in dispute stands one man, not a full member of either chamber, to whom the law gives the bare privilege of speaking, but who can command not even one vote! I leave it to your sense of right, Mr. President, whether this is the well-balanced array of strength which would be necessary to the equal presentation of the arguments on both sides and which could be secured by the employment of counsel before a court.

In conclusion, if I were insisting that the bill submitted to you last summer should be thrown out and its embodied award dismissed as a finality I should not feel that I was placing myself upon any higher footing than an advocate of one side in the pending dispute. But in asking that all my own personal and official preferences be disregarded, and that you cast your influence in favor of having a judicial body, rather than the Congress or any administrative officer, pass upon this question, I feel sure that I am placing myself in harmony with your general policy of the "square deal." Resting on that assurance, I renew my appeal that the bill of last summer be exchanged for a new measure turning over the whole controversy, just as it stands, to the Court of Claims, with full power to settle it on the same lines as would be followed in the settlement of a controversy between two litigants of our own race and of our own capacity for self-defense.

Copies of the briefs of the attorneys for the contending parties are inclosed.

Very respectfully,

F. E. LEUPP,
Commissioner.

SAC AND FOX INDIAN AGENCY, TOLEDO, IOWA.

Hon. R. G. Cousins, House of Representatives.

SIR: Your petitioners, the Sac and Fox Indians of the Mississippi, comprising that portion of the tribe residing in the State of Iowa, the other portion of said tribe residing in the Territory of Oklahoma, having received from their attorney, R. V. Belt, at Washington, D. C., the statement made by their brethren in Oklahoma on their claims now pending before Congress, contained in a letter addressed by Agent Ross Guffin, on February 17, 1903, to Hon. F. M. Cockrell, U. S. Senate, and by him referred to the Chairman of the Senate Indian Committee, and by him referred to
104 Senator Dolliver, who has suggested your consideration thereof, beg leave to make the following reply thereto:

Your petitioners have had pending before Congress certain unadjusted claims, arising out of unequal distribution of the tribal annuities and other moneys between the two branches of the tribe, since 1895, when our memorial, printed in Senate Mis. Doc. No. 48, 53d Cong., 3d sess., was presented to that body by Hon. W. B. Allison, U. S. Senate.

That as the result of that memorial Congress enacted the following provision of law, in an act approved March 2, 1895:

"That the Secretary of the Interior be, and he is hereby, directed to examine the claim of the Sac and Fox Indians of Mississippi, now residing in the State of Iowa, as set forth in their memorial

presented to Congress (Senate Miscellaneous Document Numbered Forty-eight, Fifty-third Congress, third session), for the payment of annuities and other sums from the tribal funds of said Sac and Fox Indians of Mississippi and any and all claims of that portion of the tribe residing in Iowa, and to ascertain whether, under any treaties or acts of Congress, any amount is justly due them as a portion of said tribe from those of said tribe now in Oklahoma by reason of any unequal distribution of tribal annuities, land funds, or funds from other sources; and if so, how much, giving full opportunity to all parties in interest to be heard, and to report his conclusions to Congress at the next assembling thereof." (28 Stats. L., 903.)

That the claims set forth in the said memorial thus referred to the Secretary of the Interior for examination and report comprised three in number; that the report of the Secretary of the Interior thereon is dated March 12, 1896, and is printed in Senate Doc. No. 167, 54th Cong., 1st session, wherein his conclusions are stated as follows:

"First claim: Nothing is found due on this claim for annuities from 1853 to 1867, it being held that the same were forfeited in consequence of the Indians abandoning their reservation in defiance of treaty obligations and without consent of the United States Government."

"Second claim: Nothing is found due on this claim for annuities charged to have been unjustly apportioned from 1867 to 1894. It is held that the same had been properly and justly apportioned and paid in accordance with the provisions of the several treaties and acts of Congress."

"Third claim: On this claim for their proportionate shares of \$147,393.32, appropriated by the act of April 10, 1869, in payment for lands ceded by the first and second articles of the treaty of February 18, 1867, there is found due them the sum of \$29,184.38 on account of principal, and \$32,832.45 interest thereon, at the rate of 5 per cent per annum from July 1, 1873, to December 31, 1895, inclusive, aggregating \$62,016.83, 'Less \$19,123.58,' leaving balance due of \$42,893.25." (See pages 13 and 14.)

That the Oklahoma branch of the tribe was duly notified of the prosecution of said claim, and were heard before the Secretary of the Interior, through their duly appointed delegates.

That the claimant Indians were represented by their authorized attorneys, and protested against the conclusions reached by the Secretary of the Interior on each and all of said claims, and said protest, after consideration by the Secretary, was forwarded to the Congress with his said report on said claims.

105 That Congress did authorize the payment of the amount so reported by the Secretary of the Interior to be due on said third claim, to wit, \$42,893.25, from the tribal funds. (29 Stats. L., 331.) That since said adjustment of said third claim the claimant Indians have ceased to contend for the larger amount they claim should have been allowed to them thereon.

That no committee of Congress, nor either branch thereof, has

ever taken any action on the report of the Secretary of the Interior on the said first and second claims; the claimant Indians have never abandoned the prosecution of said claims, but have continued to press for legislation for their final and favorable adjustment, extending the second claim always to date, as the wrong claimed is a continuing one, and adding the further claim for the treaty allowance to the principal chief of the Foxes, which was withheld from him until about 1900, when payments to him were resumed as a result of the prosecution of these claims.

That the claimant Indians have continued to represent to members of the Iowa delegation in Congress, and to the committee of Congress, that the Secretary of the Interior made no such examination and investigation of said first and second claims, as were contemplated and required by the act of 1895; that the alleged provisions of the treaties and laws, as well as the facts, upon which the Secretary of the Interior based his finding of a *forfeiture* by the claimant Indians of their treaty rights as claimed, prior to 1867, did not sustain establish, or warrant any such finding; that no investigation of the accounts of the annual disbursements of the annuities was made or caused to be made by him "*to ascertain whether under any treaties or acts of Congress any amount is justly due them as a portion of said tribe from those of said tribe now in Oklahoma by reason of any unequal distribution of tribal annuities,*" etc.; that he did not go into the records to get the facts that would enable him to determine whether there had been any such "*unequal distribution,*" but confined himself to the consideration of the imperfect and incomplete information presented by the claimant Indians to Congress in the memorial referred to him by the act of 1895.

That on our appeal to you, a resolution was introduced in the House, calling on the Secretary of the Interior for the full and complete information necessary to enable the proper committees of Congress to examine and consider said claims; that said resolution was favorably reported by the House Indian Committee, and was adopted by the House on January 26, 1900; that no reply was made thereto until April 4, 1900, when it was reported that because of the want of sufficient clerical help, and the disordered condition of the records to be examined, the Department was unable to furnish the information called for, and it was suggested that the call be made upon the Secretary of the Treasury, as the original records required to be examined were filed in that Department. (H. R. Doc. No. 569, 56th Cong., 1st sess.)

That thereupon you introduced a resolution in the House, calling upon the Secretary of the Treasury for the required information, which on favorable report by the House Indian Committee, was adopted by the House on June 10, 1900; that the answer was made thereto by the Secretary of the Treasury on December 2, 1901, and is printed in H. R. Doc. No. 38.

106 That on the information thus obtained, after so much effort and delay, a bill for the relief of the claimant Indians, and for the adjustment of their claims was introduced by you in the House of Representatives on January 6, 1902 (H. R. 7662), which

was referred to the Indian Committee, and by it to a subcommittee, which fully, carefully, and thoroughly investigated and considered the claims and prepared a favorable report thereon, but the matter received no final action by the full committee.

That Hon. J. P. Dolliver introduced in the Senate on January 5, 1903, a proposed amendment to the Indian bill H. R. 15804 to the same effect as the House bill 7662; also a memorial of the claimant Indians, which is printed in Senate Document No. 64, 57th Congress, 2nd session. That in said memorial the claimant Indians have set forth the facts, the official facts, taken from the report of the Secretary of the Treasury (Doc. No. 38), which show not only that their claims are conclusively proved, but also that the Secretary of the Interior failed to make such examination of the official facts contained in the records of the Departments as was required of him by the law of 1895.

That the statement of the Oklahoma branch of the tribe that they have always treated their brethren in Iowa with great generosity and kindness, being willing at all times to render to them all that may be justly found due them, may be taken for what it is worth, in the light of the history of the past and of their present opposition to these claims, so absolutely shown to be founded in justice and equity.

That by a treaty made by the Oklahoma branch in 1859, those of the tribe in Iowa were deprived of valuable rights thereunder; and notwithstanding your petitioners have no knowledge that the notice required to be served upon them by the said forfeiture article of that treaty was ever given, they have refrained from claiming any benefits under said treaty. (14 Stats. L., 469.)

That by the treaty of 1867 it was again sought to secure a forfeiture of our tribal rights, not only under that treaty, but under all of our treaties, but this great injustice was prevented by an amendment to that treaty, secured by our friends in Congress (15 Stat. L., 507); and that, as the amendment of that treaty delayed its final ratification and the situation of the claimant Indians being then before Congress, that body enacted the following provision of law:

"That the band of Sacs and Foxes of the Mississippi, now in Tamar (Tama) County, Iowa, shall be paid pro rata according to their numbers of the annuities, as long as they are peaceful and have the assent of the government of Iowa to reside in that State." (14 Stats. L., 507.)

That as soon as said Indians returned to Iowa they reported to the proper authorities of the State, thinking the governor still was ex officio superintendent of Indian affairs in the State, as when they removed from it; that their situation was laid before the legislature, which by act of July 15, 1856, granted them permission to remain in the State, requested the governor to make a census and ask the Secretary of War to pay to them in Iowa their annuities due and to become due; that the permission of the State for them to remain in it has never been withdrawn; that they have always been peaceful; but that they failed to secure the payment of any portion of their tribal

107 annuities from 1855 to 1867 and have utterly failed to secure at any time since 1867 the payment of their annuities "according to their numbers," as the official report of the Secretary of the Treasury abundantly attests.

That as their claims are calculated on the official enrollment of each branch of the tribe, as made by the disbursing officers who paid the annuities, set out in the report of the Secretary of the Treasury (Doc. No. 38), and on the official statement of their numbers prior to 1867, as made by the Secretary of the Interior to the Secretary of the Treasury (*ibid.*, pp. 20, 21), notwithstanding such official statement is far below what the claimant Indians insist were the true numbers for that period (*ibid.*, pp. 22-26), no further comment is deemed necessary on the unjust statement of the Oklahoma branch of the tribe that the claimant Indians have always claimed greater numbers than they had.

That the claimant Indians never heard of any contribution made for their relief, in the latter fifties, or at any other time, of \$5,000, or of any other amounts, by the Oklahoma branch of the tribe; that the official records, as reported by the Secretary of the Treasury, show all moneys paid to them; that they have never received any except what rightfully belonged to them; and that they have failed to secure all that justly belong to them, under the laws and treaties in the premises.

That the claim of the Oklahoma branch of the tribe, that they "really constitute the tribe proper," has no force in the face of the law requiring that the members of the whole tribe shall be "*paid pro rata according to their numbers of the annuities.*"

That the allegation that the differences causing the separation of the tribe into the two branches arose on the question of civilization and education of the children of the tribe is without foundation. The official reports of the U. S. Indian agents for the time show that no schools had been established for the education of the tribe; that all of the Indians, save Keokuk himself, were opposed to the use of their annuities to make improvements, etc. If those reports represent the truth, they do not make a very favorable history for the Oklahoma branch of the tribe, who were represented as taking on all the vices and none of the virtues of civilization. The claimant Indians do not claim perfection for themselves, or that they have always favored progress in the ways of civilization; but their history will show a freedom from vicious habits that will compare favorably with that of any Indian tribe; they have bought and paid for their lands with their own money; have lived at peace with the people of Iowa, although for many years there was no agent of the Government to look after them, and they now have their children in school.

That in view of all the public and official proceedings on these claims, of which the Oklahoma branch of the tribe had due official notice at the inception thereof, and put in their appearance and were heard thereon, by duly appointed delegates, before the Secretary of the Interior, it can not be truthfully alleged that they had no knowledge that these claims were being prosecuted. That the law of 1895 gave no warrant to any officer of the Government to assure them that

the report of the Secretary of the Interior, made thereunder, would be a permanent and final settlement of the claims, inasmuch as that law required a *report*, which is in no sense an *award*, and the law contains no suggestion that it would be considered as *final*, but was clearly intended to be for the information of Congress, with the view of consideration by that body of the claims of the claimant Indians, presented to that body because of failure to secure consideration thereof, and action thereon by the executive branch of the Government.

That the conclusion of *forfeiture* by claimant Indians of their treaty rights, involved in their first claim as reported to Congress, by the Secretary of the Interior, is based by him on two grounds:

1. On forfeiture provision in the treaty of 1859.

2. On a letter of one of his predecessors, Hon. J. P. Usher, saying that annuities should not be paid to Indians (Winnebagoes) absent from their tribe.

That the claimant Indians have conclusively shown that the forfeiture provision of the treaty of 1859 is specifically, by its words and terms, confined and restricted to *benefits arising under that treaty only*, and that no claim has been set up for anything thereunder.

That the action of the Secretary of the Interior, Mr. Usher, dated September 17, 1863, refusing payment of annuities to Winnebagoes absent from their tribe, was promptly overruled and set at naught by act of Congress of June 24, 1864 (13 Stats. L., 172); that as the Secretary was unable, in all the history of the dealings with the Indian tribes, to cite any other decision to support his conclusion of forfeiture, a conclusion that the law abhors, and courts frown upon, and that decision being shown to have been overruled by a superior tribunal, it is not, and can not be held to be sustained.

That the claimant Indians have shown that—

The tribal annuities amount annually to the sum of (Sen. Doc. 64, pp. 4-16)
\$51,000.00.

The Department has annually deducted for the exclusive use of the Oklahoma branch, the following sums:

For support of manual-labor school...	\$5,000.00
For support of national government of tribe	5,000.00
For physician and medicines, since 1874	1,150.00

Total amount so deducted.....	11,150.00
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Balance (ibid., p. 16)	39,850.00
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That for the period from 1855 to 1866, inclusive, the whole of the tribal annuities were paid to or expended for the benefit of the Oklahoma branch of the tribe, as follows:

Amount expended by the Department for supplies, etc..	\$94,609.11
Amount paid in cash per capita payments.....	694,290.15

That, leaving out of the consideration the amount expended for supplies, etc., \$94,609.11, the claimant Indians have shown that their share of the amount paid in per capita payments, \$694,290.15, according to their numbers, as officially reported by the Secretary of the Interior, for said period, is \$96,400.29. (Ibid., pp. 5-13.)

The claimant Indians contend that they have not been, as required by the treaty of 1867, and the act of Congress of the same year, "paid pro rata according to their numbers of the annuities." This claim is substantiated by the facts presented in the report of the Secretary of the Treasury (H. R. Doc. No. 38, 57th Congress, 1st session), notwithstanding the report of the Secretary of the Interior to Congress, to the contrary, made prior thereto.

109 The said official report of the Secretary of the Treasury, made from the facts and figures contained in the accounts of disbursements of the money as actually made, show the following situation:

The Kansas-Oklahoma Branch of the Tribe.

Total amount expended for or paid to them for the period from January 1, 1867, to December 31, 1899	\$1,485,178.93
As explained in memorial of the claimant Indians, set out in Senate Doc. No. 64, 57th Congress, 2d session, the following sums should be eliminated, not being involved in this claim:	
Removal and establishing the Sacs and Foxes—	
In new territory (arts. 3, 6, 16, treaty 1867)	\$61,885.48
On lands in Kansas and payments of debts (arts. 4, 5, treaty 1859)	53,833.93
Purchase of bonds	60,839.50
Total (see page 19, H. R. Doc. 38)	176,558.91
Balance	1,308,620.02
Amount expended in payment of claims for supplies (see H. R. Doc., page 3)	54,791.63
Amount expended in satisfaction of special treaty benefits such as blacksmith, gunsmith, etc., and for manual-labor school, national government, physician and medicines, all allowed to this branch of the tribe (ibid., Ex. B, pp. 8-16)	310,209.82
Total	365,001.45
Balance	943,618.57

By reference to Exhibit B. on page 12 of the H. R. Doc. No. 38, it will be seen that it is there reported that the amount of \$943,618.27 is the amount paid in per capita payments to the Kansas-Oklahoma branch of the tribe. The annual enrollment, as given in said Exhibit B, shows that they averaged annually 506½ members or annuitants. These facts show that the average amount received by each annuitant for this period, *in cash per capita payments*, was \$1,863.02.

The Iowa Branch of the Tribe.

The total amount expended for and paid to the Iowa branch of the tribe for the period from January 1, 1867, to December 31, 1899, as shown by the report of the Secretary of the Treasury (ibid. p. 4) is.....		\$451,236.70
Amount paid on claims for supplies (ibid., p. 4).....	\$1,544.42	
Amount paid for services, etc. (ibid., p. 19)	1,354.78	
		<hr/>
		2,899.20
Balance paid to the members per capita (ibid., p. 19).....		<hr/>
		448,337.50

From the numbers of the Indians as shown by the annual enrollment of them (Exhibit C, ibid., pp. 17-19), this branch of the tribe is found to have averaged annually during this period 345½. Therefore the average amount paid to each annuitant during said period was \$1,297.76.

Unequal Distribution of the Tribal Annuities.

The average per capita amounts paid to the two branches of the tribe for the period from January 1, 1867, to December 31, 1899, are as follows:

To the Kansas-Oklahoma branch of the tribe....	\$1,863.02
To the Iowa branch of the tribe.....	1,297.76

Difference against the Iowa branch of the tribe	565.26
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110 This difference of \$565.26 in the average amounts paid, multiplied by the average number of the Iowa branch of the tribe, shows that the claimant Indians have suffered in the *unequal distribution of the tribal annuities*, for said period to the aggregate amount of \$195,897.33.

As the unequal distribution has continued since 1899, and is yet continuing, the adjustment of this claim must be calculated for each year to the date of the actual settlement. Such legislation should be enacted as will put a stop to such unequal distribution in future years.

The foregoing result leaves to the determination of Congress, what, if any, allowance shall be made to the claimant Indians, by reason of the fact that all of the amounts for special treaty stipulations, not

forming a part of the \$51,000 annuities, as well as about \$11,150 of the last-mentioned sum, have been expended for or paid to the Kansas-Oklahoma branch of the tribe during said period.

The enrollments of the Kansas-Oklahoma branch of the tribe show a gradual decrease of their numbers, while the reverse is the case of the Iowa branch of the tribe. (Ibid., Exhibits A and B, pp. 6-12 and Ex. C, p. 17.)

On no ground of right, justice, or equity are the members of the Kansas-Oklahoma branch of the tribe entitled to have annually deducted from the tribal annuities the sum of \$11,150 for their sole, separate, and special benefit, and then to have an unequal and greater proportion of the balance distributed to them in per capita payments. It is not fair; it is not right; it is not just; the claimant Indians will never cease to contend against it until proper redress is secured.

The claimant Indians have shown that the \$500 treaty annuity due and payable to the principal chief of the Foxes has been withheld from him for the period from 1855 to 1899, both inclusive; that payment of said annuity was resumed to said principal chief of the Foxes, in 1900, as a result of the prosecution of these claims; and that there is therefore due to said principal chief the said annuity for the period it was so withheld, amounting to \$22,500. This is more fully shown in the memorial of the claimant Indians (Senate Doc. No. 64, 57th Congress, 2d session, pp. 20-21), where will also be found a recapitulation of the claims of the claimant Indians, amounting in the aggregate to \$317,797.62.

That aggregate amount does not include any allowance on the sums deducted annually and expended for the sole benefit of the Kansas-Oklahoma branch of the tribe, nor does it bring the second claim to a later period than December 31, 1899. These matters must be adjusted in any final determination of this appeal. The claimant Indians challenge the utmost scrutiny of the facts as they have presented them and urge the early settlement of this long-standing contention.

To you, Hon. R. G. Cousins, and to your associates in Congress, the claimant Indians are indebted for what has been thus far accomplished in their behalf, a showing of the facts contained in the official accounts of the disbursing officers, which has enabled us to properly lay our case before Congress.

We return herewith to you the letter of protest made against our said claims by the Kansas-Oklahoma branch of the tribe, and thank you again for the opportunity afforded us to make reply thereto.

The matter of protest made on behalf of that portion of the Sac and Fox tribe of Indians residing in the Territory of Oklahoma, as set out in the letter of February 17, 1903, addressed by U. S. Indian Agent Ross Guffin to Hon. F. M. Cockrell, U. S. Senate, against the claims of that portion of the tribe residing in the State of Iowa, as set out in their memorial to Congress, printed in Senate Doc. No. 64, 57th Congress, 2d session, and against the measure introduced in Congress for the adjustment and settlement of said claims, having been presented to a council of the Sac and Fox Indians of the Mississippi, residing in the State of Iowa, duly called, and assembled for the consideration thereof, on the 24th day of July,

1903, and the same having been discussed and considered, the foregoing paper was adopted as answer thereto, by said council, on said day and date last mentioned.

PUSH E TE (his X mark) NEKEQUA,
President of the Council,
 CHA LA TA GO SA, *Secretary of Council.*

SAC AND FOX AGENCY, IOWA, *July 24, 1903.*

I, Joseph Tesson, interpreter of the Sac and Fox Indians in Iowa, did interpret to them the foregoing paper, in council assembled, and that the same, after discussion and consideration, was adopted as the action of the council.

JOSEPH TESSON, *Interpreter.*

SAC AND FOX AGENCY, IOWA, *July 24, 1903.*

I, William G. Malin, agent of the Sac and Fox Agency, Iowa, hereby certify that the council of the Indians, held as stated in the foregoing proceedings thereof, was duly called, and assembled, at the usual place for holding such councils, and according to the customs of said Indians, and that the action of said council was had, as set forth in the foregoing proceedings thereof, and that all of the Sac and Fox Indians residing in the State of Iowa were present or duly represented in said council.

WM. G. MALIN,
United States Indian Agent.

R. V. BELT,
Attorney for the Claimant Indians,
 416 Bond Building, Washington, D. C.

STRUBLE & STIGOR,
Of Council.

Stipulation.

It is this 12th day of February, 1908, stipulated and agreed by and between the undersigned that the affidavits stated below may be taken and received by the Court of Claims in the same manner and be given the same effect as if they were depositions regularly taken under the rules of the court.

The nine affidavits as printed on pages 21 to 25, inclusive, of House of Representatives Document No. 38, 57th Congress, 1st session.

Affidavit of Chief McKosito (Mah-ko-sa-toe, the Indian name) bearing date the 7th day of November, 1906, certified copy of which was filed in the Court of Claims in this case on December 20, 1907.

Joint affidavit of Second Chief David Wakolle and Councilmen Logan Kakaque, Edward Mathews, Edgar Mack, Alexander Conolly, Walter Battice, and Frank Carter bearing date the 7th day of November, 1907, certified copy of which was filed in the Court of Claims in this case on December 20, 1907.

Affidavit of Jonas H. McGowan bearing date of December 11, 1906, certified copy of which was filed in the Court of Claims in this case on December 20, 1907.

R. V. BELT, *Attorney for Claimants.*
 MCGOWAN, SERVEN & MOHUN,

Attorneys for Defendants.

The Sac and Fox Indians of the Mississippi in Oklahoma.

Statement Showing the Manner in Which the Five Hundred Dollar Annual Payment to Chief Push-e-ten-neke-que is Made.

The annual payment of five hundred dollars to Chief Push-e-ten-neke-que, of the Iowa Sac and Fox Indians, is made from the appropriation of the fifty-one thousand dollars, made up of fifty thousand dollars interest and one thousand dollars permanent annuity. Eleven thousand one hundred and fifty dollars is deducted for the support of schools, National Government, pay of physician, etc., from which this amount of five hundred dollars is paid, and from the balance a pro rata division is made; three hundred and seventeen eight hundred thirtieths ($317/830$) going to the Sac and Fox Indians of Iowa, the balance going to the Oklahoma division.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
WASHINGTON, February 12, 1906.

The Superintendent Sac and Fox School, Oklahoma.

SIR: Your letter of the first instant received, enclosing two letters, one from Chief McKisto and the other from Edgar Mack, members of the Sac and Fox tribe in Oklahoma. The subject of their letters relates to the bill introduced in Congress by Senator Dolliver on the 18th ultimo, providing for the adjustment of the claim by the Iowa branch of the Sac and Fox Indians against the main branch in Oklahoma, and the desire of the latter to send a delegation to Washington to represent them before Congress in opposition to any further amounts being taken from their tribal funds to satisfy this claim of the Iowa Sac and Foxes.

My letter of the 31st ultimo to you was an assurance that this Office expected to oppose the bill, when it came before it for report, with the same spirit and vigor as always heretofore, and said that at present there appeared no immediate necessity for a delegation to visit this city in opposition to the bill. With that letter there was transmitted a copy of the Dolliver bill for the information of the tribe.

Mr. Battice, whom the Oklahoma branch appointed as a delegate to visit this city, without waiting for a reply to your letter of the 22d ultimo, has arrived here and called on the Office. The matter of the Iowa claim was talked over between us very fully and he was told that, unless some matter arose which we could not foresee at all, this Office would oppose to the full extent of its power any attempt to get any more money from the Oklahoma Sac and Fox tribe
113 for the Iowa Sac and Fox. He seems to understand the situation, and to be satisfied with the position taken by this Office in the matter. The council or delegation could do no more for the tribe than he is doing, if it came on in a body. It would simply have to pay its expenses and have nothing to show for them. Congress does not listen to any delegation any more carefully than to the Commissioner of Indian Affairs.

Chief McKisto in his letter touches especially on one subject which the delegation wished to talk about if they came here—that of asking the Government to extend the trust period of their land patents because many of their people are not sufficiently advanced

in the knowledge of the laws, etc., to take care of themselves as white men do. I shall have to answer these Indians as I do others who raise the same point: Let those individual Indians who think that their own trust period ought to be extended, sign a petition to me, asking for such an extension in their own cases and reciting the special reasons for making their request. With this petition before me, I can then look into their cases and advise the Secretary of the Interior, who will then advise the President in accordance with what may be disclosed to be the facts.

Please inform the Sac and Fox tribe that their request for the payment of \$50,000 to them out of their tribal funds has been considered and meets my approval, and a bill will be submitted to Congress to authorize such payment per capita, or corresponding expenditure for their benefit in the discretion of the Secretary of the Interior.

Very respectfully,

F. E. LEUPP,
Commissioner.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
WASHINGTON, June 25, 1906.

The Secretary of the Interior.

SIR: I have the honor to acknowledge the receipt, by your reference of the 22d instant, for immediate report, of the enrolled bill entitled "An act to provide for the annual pro rata distribution of the annuities of the Sac and Fox Indians of the Mississippi between the two branches of the tribe and to adjust the existing claims between the two branches as to said annuities."

In connection with this bill your attention is respectfully invited to Office letter of May 11, 1906, relative to the protest by the Sac and Fox Indians in Oklahoma against any further division of their tribal funds in favor of the Iowa branch and the recommendation by this Office that before any further distribution take place it would be only just and proper that the Oklahoma branch be given an opportunity to be heard, and it was believed that the only just way to settle these claims of the Iowa branch was to allow them to be judiciously determined by the Court of Claims where both parties could present all their evidence. It was requested that a copy of Office letter of May 11th be transmitted to Congress and that the bill be held in abeyance until the Sac and Fox branch in Oklahoma had time to prepare their protest against the Iowa branch.

114 By reference to House Document No. 805, 59th Congress, first session (copy herewith attached), there will be found the letter from the Department transmitting the correspondence from this Office to the Speaker of the House of Representatives, approving the recommendations herein referred to and adding that the Department fully agreed with the Commissioner of Indian Affairs in his belief that the only way to settle the contention between the two branches of the Sac and Fox Indians of the Mississippi was to allow them to be judiciously determined in the Court of Claims and recommended such a settlement for the consideration of Congress.

I desire to say that the bill under consideration was not referred to this Office before its passage by Congress for consideration and report. The last report on the subject by this Office was dated February 3, 1904, on Senate 3459, 58th Congress, second session, in which it was recommended that before final action was taken by Congress on the claims of the Iowa Sac and Fox that the Oklahoma branch should be given an opportunity to present their side of the question against the claim. The Oklahoma branch has not been given an opportunity to be heard on the present bill and I most earnestly recommend its disapproval by the President.

The bill is herewith returned.

Very respectfully,
(Signed)

C. F. LARRABEE,
Acting Commissioner.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
WASHINGTON, November 17, 1865.

Elijah Sells, Esq., Supt. Ind. Aff's, Present.

SIR: On the 15th inst. I caused a requisition to issue in your favor for \$5,000, to be remitted to you, present, from the appropriation "Fulfilling treaty with Sac and Foxes of Miss." (annuity), for which you will be held to account under your bond of August 22, 1865.

In a late interview with a delegation of the Fox Indians of the Confederated Band of Sacs and Foxes of the Mississippi, I was informed that a large portion of their people are in Iowa and in a destitute condition.

With the concurrence of the Secretary of the Interior, you are directed to proceed to Iowa at an early day and ascertain how many of the Fox Indians are in that State and what is their condition, and as soon as practicable report the same to this Office, with such other matters as may be called to your attention in your visit to them.

The funds remitted to you, as above stated, are to enable you to relieve the present wants of these Indians and make such provision for them as may insure a proper care for them and prevent any suffering during the coming winter.

There is now before the Department a question as to the extent of the rights of the Fox Indians in Iowa to share in the annuities of the Sacs and Foxes of the Mississippi, pending which it is
115 not desired to apply any more of these funds to their benefit than their wants absolutely require. You will therefore, in using the funds so placed in your hands, exercise as much economy as is consistent with humanity. Your traveling expenses while in the discharge of this duty will be commuted at the usual rate. Other actual and necessary expenses will be allowed on the presentation of proper vouchers.

Very respectfully, your ob't servant,

D. N. COOLEY,
Commissioner.

DEPARTMENT OF THE INTERIOR,
OFFICE OF THE ASSISTANT ATTORNEY-GENERAL,
WASHINGTON, *December 23, 1895.*

The Secretary of the Interior.

SIR: I have your favor of the 18th instant, in which you ask for my opinion touching the application of the Sac and Fox Indians of Iowa "for their just proportionate shares of the tribal annuities," secured by treaty to the Sac and Fox Indians of the Mississippi. By act of Congress approved March 2, 1895 (28 Stat., 903), the Secretary is directed to examine into the claim of the Sac and Fox Indians of the Mississippi, now residing in the State of Iowa, and ascertain whether under any treaties or acts of Congress any amount is justly due them upon an equal distribution of the tribal annuities, land funds, or funds from other sources secured to the Sac and Fox Indians of the Mississippi. The Sac and Fox Indians of Iowa in their memorial ask for an accounting under said act of Congress, and set out their claims as follows:

1st claim. For their shares of the annuities from 1855 to 1866, inclusive.

2d claim. For their shares of the annuities from 1867 to 1894, including the \$5,000 set apart for support of manual labor school; \$5,000 set apart for support of government—both these items under article 9 of treaty of 1867—and of \$1,500 set apart for pay of a physician and for purchase of medicines, for several years past—say from 1875.

3d claim. They raise the question of citizenship and the right of the Oklahoma branch to the use of the whole of the \$5,000 for support of government is contested.

Upon this claim so presented you ask my opinion as to what rights the memorialists have in respect to the several matters presented by them.

The annuities to which the Sac and Fox of "the Mississippi" are entitled are derived from treaties as follows: From the treaty of 1789, \$1,000; from the treaty of 1837, \$10,000; from the treaty of 1842, \$40,000, making a total of \$51,000.

At the date of the last-named treaty the tribe resided in Iowa, but by said treaty ceded their lands in Iowa to the United States, and accepted other lands in lieu thereof in Kansas. The tribe was moved to their new reservation, but in the winter of 1854, and '55 a portion

of the tribe returned to Iowa, and thereafter purchased lands upon which they now reside, and they are known as the Sac and Fox of Iowa. Their abandonment of the reservation provided for them in Kansas and taking up their residence in Iowa was without the consent of the United States.

In their first claim they ask for annuities from 1855 to 1866, both inclusive. They were not upon the reservation after 1855. They had abandoned it, and, so far as I am advised, never claimed during those years any annuities that were paid out to the Sac and Fox Indians upon said reservation. I have been informed, upon inquiry at the Indian Division, that during said years it was the policy and practice of the Government to pay no annuities to Indians who ab-

sented themselves from reservations, without authority, during the time of their absence, unless there was some provision of statute, or treaty, or agreement with the tribe of Indians that would authorize or require payment to such absent Indians. In this case, I have been unable to find any requirement for the payment to the Sac and Fox Indians of Iowa from 1855 up to and including 1866. This policy of withholding treaty benefits from Indians who absented themselves from reservations without authority is clearly indorsed by the terms of the treaty between the United States and the Sac and Fox tribe of Indians, agreed to October 1, 1859. (See section 7 of said treaty, 15 Stat., 469.) I am therefore of the opinion that they are not entitled to any of the annuities that were paid to the Sac and Fox Indians during the said years.

By act of Congress approved March 2, 1867 (14 Stat., 507), it was provided—

“That the band of Sac and Fox of the Mississippi now in Tamar (Tama County), Iowa, shall be paid pro rata according to their numbers, of the annuities, so long as they are peaceful and have the assent of the government of Iowa to reside in that State.”

A treaty made between the United States and the Sac and Fox Indians ratified October 14, 1868 (15 Stat., 495), for the removal of the Sac and Fox Indians from the reservation in Kansas to a reservation in the Indian Territory, recognized the rights of the Sac and Fox Indians of Iowa to share in the annuities of the Sac and Fox tribe of Indians. It does not appear what number of Sac and Fox Indians resided in Iowa from 1866 to 1885. The amount of money paid to them annually, however, from the annuities was \$11,174.66.

In 1884 (23 Stat., 85) it was provided by Congress that the Sac and Fox Indians of Iowa should be paid their proportionate share of the annuities coming to the Sac and Fox Indians under the different treaties with said tribe of Indians and the acts of Congress fulfilling such treaty obligations; and it was provided that such payment should only be made to the original Sac and Fox then in Iowa, to be ascertained by the Secretary of the Interior. Pursuant to this requirement of Congress, a census was taken, and it was ascertained that there was at that time 317 original Sac and Fox Indians residing in Iowa. From that date, including the fiscal year 1886, the Sac and Fox Indians have been paid about \$15,000 annually as their share of the annuities, except in one year when they were paid a larger sum.

In their memorial these Indians complain that from 1867 to 1885 they were not paid the per capita amount which they were
117 entitled to receive under the act of Congress approved March 2, 1867 (supra), and under the treaty ratified October 14, 1868 (supra).

I find that an act of Congress approved May 17, 1882 (22 Stat., 78), provided, “That hereafter the Sac and Fox of Iowa shall have apportioned to them from appropriations for fulfilling the stipulations in said treaties no greater sum thereof than that heretofore set apart for them.” Thus it will be seen that from 1882 to 1885 there could not be paid to the Sac and Fox of Iowa any greater sum of money annually than they had received annually prior to that time.

I am of the opinion also that this act of Congress should be construed as a legislative approval as to the manner in which the fund had been distributed prior to its date, and that the Sac and Fox of Iowa are not entitled to any further sum on this account.

The memorialists also set up the claim that the \$10,000 which the treaty, approved October 14, 1868, provides shall be set apart for the maintaining of schools and for the maintaining of tribal government should not affect their shares of the annuities. That is to say, that the aggregate annuities, to wit, \$51,000, should be divided pro rata among the Sac and Fox of Iowa, as well as the Sac and Fox of Oklahoma, without any deduction on account of maintaining schools and the tribal government of the Oklahoma Sac and Fox Indians.

I do not think this contention is sound. This matter was, in my judgment, properly disposed of by Secretary Lamar in a letter addressed to the Commissioner of Indian Affairs, on June 1, 1886, in which he decided that the \$10,000 should be deducted from the \$51,000, and the remainder distributed.

The Sac and Fox of Iowa also claim that the \$1,500 which Congress has provided annually since 1875 should be set apart for the payment of a physician and the purchase of medicines, should not be deducted from the annuities before distribution among the Indians, but that said amount should be charged to the Sac and Fox of Oklahoma.

I find in the first act of Congress in which appropriation was made for this purpose the following language: "of which sum one thousand five hundred dollars shall be paid for a physician for the agency, who shall furnish the necessary medicines." (Act of June 22, 1874, 18 Statutes, 163.)

Congress in express terms directed that "of this sum," meaning of the \$51,000 appropriated, \$1,500 should be paid for a physician for the agency, who shall furnish the necessary medicine. It is very evident that said amount was to be taken from the gross sum appropriated, and that the appropriation was for the benefit of the Sac and Fox on the reservation set apart for that tribe under the treaty of 1868.

In some of the subsequent acts making annual appropriations for this purpose the language of the original appropriation is changed, but there is not such a change of language as would indicate a change of intent on the part of Congress.

This I regard as an answer to the second claim made by the memorialists.

Their third claim raised this question: That the Sac and Fox Indians of Oklahoma have become citizens of the United States and of the Territory of Oklahoma; that the tribal organization can no longer exist, and that they should not have reserved for them
118 \$5,000 for the support of a tribal government. Notwithstanding these Indians are citizens of the Territory of Oklahoma and of the United States, yet they have been treated by Congress as a tribe, for the purpose of carrying out the treaty stipulations with them. This Congress may do. (See 3 Wallace, 419, and

letter of Secretary Smith to Attorney-General Olney, of date January 22, 1895.)

Regarding the act of March 2, 1895, as calling for a report on the claim of the Sac and Fox of Iowa for a readjustment of annuities under rights existing prior to that date, I advise against the claims of the memorialists.

Herewith I return the papers.

Respectfully submitted.

JOHN I. HALL,
Assistant Attorney-General.

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House of Representatives.

57th Congress, 1st Session.

Document No. 38.

Annuities of the Sac and Fox of the Mississippi.

Letter from the Secretary of the Treasury Transmitting a Reply to the Direction of Congress in Regard to Annuities of the Sac and Fox of the Mississippi.

December 3, 1901.—Referred to the Committee on Indian Affairs and ordered to be printed.

TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
WASHINGTON, December 2, 1901.

SIR: In compliance with the resolution of the House of Representatives of June 5, 1900,

That the Secretary of the Treasury be, and he is hereby, authorized and directed to cause an examination to be made, and to report to the House, as early as may be practicable, what were the numbers of the respective portions of the confederated tribes of Indians, known as the Sac and Fox of the Mississippi, receiving annuities at the two agencies having charge of the respective portions of the tribes, as shown by the original accounts of the proper disbursing officers on file in the proper bureau of the Treasury Department, from eighteen hundred and sixty-seven to eighteen hundred and ninety-nine, both inclusive, and the amounts of the tribal annuities paid to or expended for each portion of said tribes, and to state accounts in detail showing any unequal apportionment and distribution of said tribal annuities to that portion of the tribes residing in the State of Iowa, first, on the basis of the whole of the annuities, and second, on the basis of what remained of the annuities after deducting such amounts as were annually expended to meet the specific requirements of treaty provisions. Also to report what would have been the amounts of the shares on the same basis of that portion of the tribes residing in the State of Iowa for the period from eighteen hundred and fifty-five to eighteen hundred and sixty-six, both inclusive, during which time no portion of the tribal annuities were paid to or expended for them, as reported to Congress by the Secretary of the Interior March twelfth, eighteen hundred and

ninety-six (Senate Document Numbered One Hundred and Sixty-seven, Fifty-fourth Congress, first session); and for this latter purpose the Secretary of the Treasury will ascertain from the Secretary of the Interior the best information afforded by his Department as to the numbers of said Indians residing in the State of Iowa for each year during the latter period. The Secretary of the Treasury will also report what amount, if any, of the salary of the principal chief of the Fox Indians of said confederated tribes, for the period from eighteen hundred and fifty-five to eighteen hundred and ninety-nine, both inclusive, is shown to have been paid to him, furnishing his name from the tribal annuities as required by the fourth article of the treaty of eighteen hundred and forty-two and the ninth article of the treaty of eighteen hundred and sixty-seven with said Indians,

I have the honor to transmit herewith a report of the Auditor of the Interior Department, dated July 24, 1901, which it is believed meets in the main the requirements of the resolution.

Respectfully,

L. J. GAGE, *Secretary.*

The Speaker of the House of Representatives.

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TREASURY DEPARTMENT,

OFFICE OF AUDITOR FOR THE INTERIOR DEPARTMENT.

WASHINGTON, D. C., July 24, 1901.

SIR: I have the honor to return herewith the resolution of the House of Representatives, dated June 5, 1900, calling for information relative to the Sauk and Fox Indians of the Mississippi from 1855 to 1899, inclusive, referred by you to this office on June 7, 1900, for report.

The resolution is as follows:

In the House of Representatives.

JUNE 5, 1900.

Resolved, That the Secretary of the Treasury be, and he is hereby, authorized and directed to cause an examination to be made, and to report to the House, as early as may be practicable, what were the numbers of the respective portions of the confederated tribes of Indians known as the Sac and Fox of the Mississippi receiving annuities at the two agencies having charge of the respective portions of the tribes, as shown by the original accounts of the proper disbursing officers on file in the proper bureau of the Treasury Department, from eighteen hundred and sixty-seven to eighteen hundred and ninety-nine, both inclusive, and the amounts of the tribal annuities paid to or expended for each portion of said tribe, and to state accounts in detail showing any unequal apportionment and distribution of said tribal annuities to that portion of the tribes residing in the State of Iowa, first, on the basis of the whole of the annuities, and second, on the basis of what remained of the annuities after deducting such amounts as were annually expended to meet the specific requirements of treaty provisions. Also to report what would have been the amounts of the shares, on the same basis, of that portion of the tribes residing in the State of Iowa for the period from

eighteen hundred and fifty-five to eighteen hundred and sixty-six, both inclusive, during which time no portion of the tribal annuities were paid to or expended for them, as reported to Congress by the Secretary of the Interior March twelfth, eighteen hundred and ninety-six (Senate Document Numbered One Hundred and Sixty-seven, Fifty-fourth Congress, first session); and for this latter purpose the Secretary of the Treasury will ascertain from the Secretary of the Interior the best information afforded by his Department as to the numbers of said Indians residing in the State of Iowa for each year during the latter period. The Secretary of the Treasury will also report what amount, if any, of the salary of the principal chief of the Fox Indians of said confederated tribes, for the period from eighteen hundred and fifty-five to eighteen hundred and ninety-nine, both inclusive, is shown to have been paid to him, furnishing his name, from the tribal annuities as required by the fourth article of the treaty of eighteen hundred and forty-two, and the ninth article of the treaty of eighteen hundred and sixty-seven with said Indians.

Attest:

A. McDOWELL, *Clerk.*

The delay in submitting prompt reply was occasioned largely by reason of the labor and research necessary in collating the information desired from the vast number of accounts involved in the transaction.

The following report is submitted, which, it is believed, meets, in the main, the requirements of the resolution.

There have been advanced to disbursing officers of the Indian service from appropriations the following sums of money:

Kansas Branch of the Tribe.

"Fulfilling treaties with the Sac and Foxes of the Mississippi"—

From January 1, 1855, to December 31, 1866, inclusive.....	\$842,153.33
From January 1, 1867, to December 31, 1899, inclusive.....	1,429,234.88
"Interest on the Sac and Fox of the Mississippi fund" from January 1, 1867, to December 31, 1899.....	60,535.91
Total advances.....	2,331,924.12
Amount received by officers from sales of property from January 1, 1867, to December 31, 1899.....	2,816.22
Amounts received from officers by transfer of funds from January 1, 1867, to December 31, 1899.....	91,697.57
Total debits.....	2,426,437.91

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Disbursed by officers from January 1, 1855, to December 31, 1866, as shown by Exhibit A herewith.....	\$840,137.19
Disbursed by officers from January 1, 1867, to December 31, 1899, as shown by Exhibit B herewith.....	1,430,387.30
Total disbursements, 1855 to 1899.....	2,270,524.49

Repayment by officers to appropriations:

"Fulfilling treaties with the Sac and Foxes of the Mississippi"—

From January 1, 1855, to December 31, 1866....	1,004.68
From January 1, 1867, to December 31, 1899....	57,192.23
"Interest on the Sac and Fox of the Mississippi fund" from January 1, 1867, to December 31, 1899.....	4,796.04

Amounts turned over by officers, transfer of funds:

"Fulfilling treaties with Sac and Foxes of the Mississippi"—

From January 1, 1855, to December 31, 1866...	1,000.00
From January 1, 1867, to December 31, 1899...	88,334.32

Balance due the United States:

In hands of officers on—

December 31, 1866.....	11.46
December 31, 1899.....	3,574.69

Total credits	\$2,426,437.91
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There have been claims for the value of supplies paid for from appropriation:

"Fulfilling treaties with Sax and Foxes of the Mississippi," from

January 1, 1855, to December 31, 1866.....	37,792.28
To amount of transfers to adjust appropriations.....	100.95

Total debits.....	37,893.23
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By amount of transfers to adjust appropriations.....	252.72
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Net expenditures on account of claims.....	37,640.51
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Net disbursements, Exhibit A.....	840,137.19
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Total expenditures, January 1, 1855, to December 31, 1867.....	877,777.70
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There have been claims for the value of supplies paid for from appropriation—

"Fulfilling treaties with Sac and Foxes of the Mississippi," from January 1, 1867, to December 31, 1899.....

\$56,586.45

To amount of transfer to adjust appropriations..... 99.12

Total debits.....	56,685.57
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By repayments to appropriation on account of claims..... \$1,413.20

By amount of transfers to adjust appropriations..... 727.25

Total credits.....	2,140.45
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Net total debits.....	54,545.12
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"Interest on Sac and Fox of the Mississippi fund" from January 1, 1867, to December 31, 1899, Dr.....

\$656.06

By the amount of transfers to adjust appropriations, Cr..... 409.55

Net total debits.....	246.51
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Total expenditures on account claims.....	54,791.63
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Disbursements, Exhibit B.....	1,430,387.30
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Total expenditures from 1867 to 1899.....	1,485,178.93
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Total expenditures from 1855 to 1867.....	877,777.70
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Total expenditures from 1855 to 1899.....	2,362,956.63
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122 From Exhibit B it will be seen that \$34,886.17 and \$3,148.32, or a total of \$38,034.49, has been distributed for the payment of "certificates of indebtedness," and \$60,839.50 for the purchase of bonds. It is probable that these sums of money were expended for the benefit of both branches of the tribe, but that fact cannot be determined from the vouchers on file on the accounts. Neither can it be determined whether the remaining portion of the expenditures for payment of debts were debts incurred for the whole of the tribe or only that portion residing in Kansas. The facts can possibly be obtained from the Commissioner of Indian Affairs,

Iowa Branch.

There have been advanced to disbursing officers of the Indian service from appropriations—

"Fulfilling treaties with the Sac and Foxes of the Mississippi," from January 1, 1867, to December 31, 1899.....	\$478,009.72
"Interest on the Sac and Fox of the Mississippi fund".....	13,986.69
Amount received from officers, transfer of funds.....	1,287.03

Total debits.....	493,283.44
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Disbursed by officers from January 1, 1867, to December 31, 1899, as shown by Exhibit C.....	\$449,692.28
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Repayment to appropriations by officers:

"Fulfilling treaties with Sac and Foxes of the Mississippi," from January 1, 1867, to December 31, 1899.....	37,584.43
"Interest on the Sac and Fox of the Mississippi fund".....	1,338.16
By amounts turned over by officers, transfer of funds.....	4,668.57

Total credits.....	493,283.44
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There have been claims for the value of supplies paid for from appropriations:

"Fulfilling treaties with the Sac and Foxes of the Mississippi"—From January 1, 1867, to December 31, 1899.....	\$1,209.17
"Interest on the Sac and Fox of the Mississippi"—From January 1, 1867, to December 31, 1899.....	335.25

Total on account of claims.....	1,544.42
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Disbursed by officers from January 1, 1867, to December 31, 1899, as shown by Exhibit C.....	440,692.28
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Total expenditures January 1, 1867, to December 31, 1899.....	451,236.70
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There was also a claim in favor of Kate Eberle, an Indian woman of the Sac tribe, amounting to \$672.08, paid under an act of Congress dated May 30, 1896. This claim grew out of her separation from her tribe in 1832, and from the papers with the claim it is impossible to ascertain which branch of the tribe should be charged with the sum paid.

Exhibits A and B, made from disbursing officer's accounts for the Kansas branch of the Sac and Fox tribe, show the number of Indians, amount of tribal annuities, and the amounts expended to meet the specific requirements of treaty provisions; also the salaries and names of the Government chiefs and to whom it was paid, from January 1, 1855, to December 31, 1899.

Exhibit C, made from the disbursing officers' accounts for the Iowa branch, shows the number of Indians, annuities, and total expenditures from January 1, 1867, to December 31, 1899, including expenditure by Elija Sells in 1865.

The Secretary of the Interior was requested on August 30, 1900, to furnish this office with the best information afforded by his Department tending to show the number of Sac and Fox Indians residing in the State of Iowa each year from 1855 to 1866, inclusive.

On September 4, 1900, he replied to the request stating that "Reliable data as to the number of the Iowa branch of the Sac and Fox tribe, from 1855 to 1866, is not at hand."

Therefore, this office could not satisfactorily state the accounts—showing an unequal apportionment and distribution of tribal annuities to the portion residing in the State of Iowa—asked for in the resolution.

The Secretary's letter together with nine affidavits made by Indians of the Iowa branch of the Sac and Foxes, transmitted to this office by the Commissioner of Indian Affairs, under date of October 20, 1900, accompanies this report.

Difficulties were encountered in the preparation of this report, particularly because the records of this office do not furnish information concerning Indian tribes, or disbursements from particular appropriations for their support; but are prepared solely for the purpose of obtaining information concerning accounts of disbursing officers, or claims for supplies or personal service, and are arranged alphabetically in the name of the officer or claimant.

The House resolution specifies neither names nor appropriation. This necessitated the personal gathering of such information from various other offices, after which the records of this office were resorted to, to find the settlements, about 3,000 in number, in which the expenditures were made.

The whole amount of money drawn from the Treasury, and also that received by disbursing officers from miscellaneous sources, from 1855 to 1899, has been accurately accounted for in this report, but it has been impossible to determine to a certainty from the vouchers with the accounts whether in all instances the expenditures are entered under the proper caption in Exhibits A and B, viz, "Support of mission school," or "Support of manual training school," "Removal and establishing the Sac and Foxes in new territory," or "Removal and establishing Sac and Foxes on lands in Kansas and payment of debts," and "Sac and Fox national account."

If the examination had been made and the statement prepared in the Office of Commissioner of Indian Affairs, extraneous information could have been obtained to determine such cases with exactness.

It is proper to state that the expenditures embraced in this report were made from the appropriation "Fulfilling treaties with the Sac and Foxes of the Mississippi," which appropriation is based upon article 3, treaty of November 3, 1804, article 2, treaty of October 21, 1837, and article 2, treaty of October 11, 1842, and that no part of the expenditures were made from the "Sac and Fox of the Mississippi in Iowa fund," which fund grew out of the stated account affirmed by the Secretary of the Interior March 12, 1896, Senate Ex. Doc. 167, Fifty-fourth Congress, first session, nor any other appropriation or fund.

"Interest on the Sac and Fox of the Mississippi fund," herein quoted, is a subhead of the appropriation "Fulfilling treaties with the Sac and Foxes of the Mississippi," and is so carried upon the ledgers of the departments.

Respectfully,

R. S. PERSON, *Auditor.*

The Secretary of the Treasury.

ANNUITIES OF THE SAC AND FOX OF THE MISSISSIPPI.

EXHIBIT A.

Statement made from accounts on file in the Treasury Department, Office of the Auditor For Agency, Kana., from January, 1855, to December 31, 1886, showing the number paid to them, amounts expended to meet specific requirements of treaty provisions, names instances by vouchers examined.

Agent.	Voucher.	Quarter.	Year.	Settlement and year.	Box.	No. of Indians.	Chiefs.		Per capita annuities.
							Keo-kuk (Sac).	Pe she she moan (Fox).	
B. A. James	B 1, 2, 3	First	1855	3266 (1855)	373				\$149.37
Do	B 1 to 8	Second	1855	3266 (1855)	372	1, 628			40, 148.98
Do	B 1 to 5	Third	1855	4694 (1857)	389				190.47
Do	B 1 to 5	Fourth	1855	4694 (1857)	389	1, 488	\$500.00	\$500.00	29, 457.79
Do	A 1	First	1856	4694 (1857)	389				
Do	B 1 to 7	Second	1856	4694 (1857)	389	1, 445			45, 363.80
Do	B 1	Third	1856	5892 (1857)	405				
Do	B 1 to 4	Fourth	1856	5892 (1857)	405	1, 382	500.00	500.00	34, 500.00
Do	B 1 to 7	Second	1857	5892 (1857)	405	1, 367			35, 500.00
Do	B 1 to 9	Fourth	1857	7174 (1858)	421	1, 317	500.00	Ker Sha Ma Ne. 500.00	34, 000.00
F. Tymony	B 1 to 8	Fractional second.	1858	8637 (1859)	432	1, 330			35, 500.00
Do	B 1 to 5	Fourth	1858	8788 (1859)	436	1, 293	500.00	500.00	34, 500.00
Do	B 1 to 2	First	1859	8783 (1859)	435				
P. Fuller	B 1 to 8	Second	1859	9379 (1859)	440	1, 287			35, 500.00
Do	B 1 to 6	Third	1859	9378 (1860)	451	1, 236	500.00	500.00	34, 500.00
Do	B 1 to 6	Fourth	1859	40 (1860)	460				
Do	B 1 to 12	Second	1860	545 (1861)	472	1, 280			500.00
Do	B 1 to 5	Fourth	1860	1834 (1861)	490	1, 320	500.00	500.00	34, 500.00
Do	C 1 to 7	First	1861	2836 (1861)	496				
Do	B	Fractional second.	1861	2836 (1861)	496				
C. C. Hutchinson	1 and 2	Third	1861	5722 (1861)	511	1, 341			17, 712.50
Do	B 1 to 15	Fourth	1861	5722 (1861)	511	1, 219	500.00	Maw men wau ne cah. 500.00	32, 250.00
Do	B 1 to 6	First	1862	8652 (1862)	523				
Do	B 1 to 7	Second	1862	1711 (1863)	536	1, 180			35, 500.00
H. B. Branch	14	do	1862	8033 (1862)	521				
C. C. Hutchinson	A 1, 2	Third	1862	1711 (1863)	536				
H. B. Branch	1	Fourth	1862	851 (1863)	532	1, 096	500.00	Che kus kuk. 500.00	27, 450.00
H. W. Martin	B 1, 2	Second	1863	6691 (1864)	565	996			17, 928.00
Do	B 1	Fourth	1863	6691 (1864)	565	983	500.00	500.00	16, 465.25
Do	A 1, 2	Second	1864	2082 (1866)	585	933			17, 727.00
Do	B 1	Third	1864	2082 (1866)	585	891	500.00	500.00	15, 147.00
Do	do	First	1864	2082 (1866)	585				
Do	A 1	Second	1865	2082 (1866)	585	823			16, 460.00
Do	do	Second	1865	3512 (1866)	596	818			16, 360.00
F. Murphy	21, V, 1	Second	1866	4084 (1866)	599	791			15, 820.00
H. W. Martin	A 1	Fourth	1866	6256 (1867)	626	802	500.00	500.00	16, 040.00
Do	1	do	1866	6256 (1867)	626				117.90
J. R. Goodwin	6	do	1866	5865 (1867)	617				
Total							5, 500.00	5, 500.00	694, 290.15

ANNUITIES OF THE SAC AND FOX OF THE MISSISSIPPI.

EXHIBIT A.

for the Interior Department, rendered by the agents and superintendents at the Sac and of Indians of the Confederated Tribes of the Sac and Foxes of the Mississippi, annuities and salaries of principal chiefs, the tribes to which they belonged not being shown in all

Black-smith.	Assist-ant black-smith.	Gun-smith.	Physi-cian and medi-cines.	Sup-port of mission school.	Sac and Fox national account.	Iron, steel, and gun mate-rial.	Estab-lishing the Sac and Foxes on lands in Kansas and pay-ment of debts (art. 4, 5, ty. 1869).	Tobacco and salt.	Sup-port of manual train-ing school.	Total.
	\$80.00	\$150.00								\$850.37
\$900.00	60.00	150.00						\$722.75		41,851.73
150.00	60.00	150.00				\$252.96				808.45
150.00	60.00	150.00								30,517.79
		150.00								150.00
300.00	120.00	150.00						929.75		46,865.64
						278.90				278.90
300.00	120.00	300.00								36,220.00
300.00	120.00	300.00				71.62		917.86		57,209.43
300.00	120.00	300.00	\$500.00					492.12		36,712.13
300.00	120.00	300.00			\$85.10	145.32		688.00		57,298.42
300.00	120.00	300.00						384.23		36,604.23
					21.25	157.60				178.85
300.00	120.00	300.00						471.26		36,691.26
150.00	60.00	150.00				32.25		629.70		36,521.95
150.00	60.00	148.35				156.68				515.03
300.00	120.00	300.00				214.05		498.65		36,594.30
300.00	120.00	300.00				291.63		448.06		44,869.71
						171.79	\$24,442.00	62.00		24,665.79
							717.55			717.55
								250.30		17,962.80
500.00	240.00	300.00				396.74	4,796.00	750.00		60,532.74
							736.51			736.51
300.00	120.00					159.20	20,383.97	749.15		57,272.28
							67.00			67.00
		300.00				150.00				450.00
					7,050.00					35,500.00
300.00	120.00	300.00	750.00		6,102.00			250.00		25,750.00
300.00	150.00	300.00	\$800.00	\$200.00	5,972.92				\$311.83	25,500.00
300.00	150.00	300.00	\$800.00	400.00	5,323.00	200.00	96.00		300.00	25,596.00
300.00	150.00	300.00	\$800.00	400.00	6,850.00	253.00			300.00	25,500.00
					40.88					40.88
300.00	150.00	300.00	\$800.00	400.00	4,020.00	270.00			300.00	23,000.00
300.00		300.00			18.33					16,978.33
300.00		300.00	700.00	567.15	574.22	300.00				18,561.37
300.00	75.00	300.00	600.00	500.00	797.67	300.00				19,912.67
										117.90
					849.20					849.20
6,800.00	2,500.00	6,800.00	5,750.00	2,508.08	37,613.69	3,797.30	51,237.93	8,434.85	1,211.83	840,137.19

¹ Steam mill, \$8,000.

² \$50, physician's interpreter.

ANNUITIES OF THE SAC AND FOX OF THE MISSISSIPPI.

EXHIBIT B.

Statement made from the accounts on file in the Treasury Department, Office of the Auditor for the Interior Department, rendered by the agents and superintendents at the Sac and Fox Agency, Kansas, from January 1, 1867, to December 31, 1899, showing the number of Indians of the Confederated Tribes of the Sac and Foxes of the Mississippi, annuities paid them, amounts expended to meet specific requirements of treaty provisions, names and salaries of principal chiefs, the tribes to which they belong not being shown.

Agent.	Voucher.	Quarter.	Year.	Settlement and year.	No. of Indians.	Government.		Chiefs.	Per capita annuities.	Blacksmith.
					Box.	Keokuk.	Cheko skuk.			
H. W. Martin	A 3	First.	1867	6256 (1868)	625				18350.00	
J. D. Cox, Secretary of the Interior.				6679 (1872)	755					
A. Wiley	A 1	Second	1867	7181 (1873)	767	\$250.00	\$250.00		\$12,928.71	\$400.00
Do	A 1	Third	1867	7181 (1873)	767	250.00	250.00		316,575.00	400.00
T. Murphy	A 1	Fourth	1867	7190 (1873)	767	250.00	250.00		415,972.54	400.00
A. Wiley	A 1	Second	1868	7194 (1873)	655	250.00	250.00		15,920.00	400.00
T. Murphy	A 1 to 39	Second	1868	7190 (1873)	767					
E. Hoag	do	Third	1868	7190 (1873)	767					
Thos. Miller	E	Fourth	1868	7190 (1873)	767					
Thos. Miller	A 1 to 20x	Fourth	1869	8473 (1874)	742	250.00	250.00		14,540.00	
E. Hoag	1, 3.	do	1869	8473 (1874)	735	250.00	250.00		13,140.00	844.00
Thos. Miller	A 8 to 24	First	1870	2000 (1874)	932				10,979.00	251.00
E. Hoag	14, 7	Second	1870	2000 (1874)	812	250.00	250.00			
Thos. Miller	A 3	do	1870	2000 (1874)	932					
Do	A 8 to 26	do	1870	2000 (1874)	932					
Do	A 2, 3, 6, 7, 8 to 15	Third	1870	2000 (1874)	932					
Do	A 5, 7, 10 to 18	Fourth	1870	2000 (1874)	932					
E. Hoag	12, 5.	do	1870	1824 (1874)	478	250.00	250.00	Ucqua ho ko. Pah teek qua.	400.00	
Columbus Delano, Secretary of the Interior.				6262 (1872)	747			\$250.00	11,950.00	400.00
Thos. Miller	A	First and second.	1871	2000 (1874)	932					
J. Hadley	A 3, 4, 5, 7, 12, 13, 14, 17, 22, 24, 25.	Second	1871	1194 (1875)	906					
E. Hoag	8.	do	1871	1824 (1874)	830					
J. Hadley	A 19 to 20, 12, 14 to 17.	Third	1871	1184 (1875)	906					
Do	A 2, 7, 9 to 12, 16, 17, 19.	Fourth	1871	1184 (1875)	906					
E. Hoag	8.	do	1871	1824 (1874)	830					
J. Hadley	A 2.	Second	1872	1184 (1875)	906					
E. Hoag	8.	do	1872	1824 (1874)	831					
J. Hadley	A 1 to 5, 6 to 20, 22 to 27.	Third	1872	1184 (1875)	906					
E. Hoag	9.	First.	1872	1824 (1874)	831					
										30.00

ANNUITIES OF THE SAC AND FOX OF THE MISSISSIPPI.

Do	7 to 13, 15, 20	1887	5944 (1888)	7982	500.00	500.00	500.00	25,569.35	150.00
Do	First	1888	5944 (1888)	7982	500.00	500.00	500.00	175.00	350.00
Do	Second	1889	5944 (1888)	7982	500.00	500.00	500.00	25,695.45	282.00
Do	Third	1890	5944 (1888)	7982	500.00	500.00	500.00	1,080.00	175.00
Do	Fourth	1891	5944 (1888)	7982	500.00	500.00	500.00	25,925.90	175.00
Do	First	1892	5944 (1888)	7982	500.00	500.00	500.00	1,080.00	175.00
Do	Second	1893	5944 (1888)	7982	500.00	500.00	500.00	25,771.70	175.00
Do	Third	1894	5944 (1888)	7982	500.00	500.00	500.00	400.00	225.00
Do	Fourth	1895	5944 (1888)	7982	500.00	500.00	500.00	225.00	225.00
Do	First	1896	5944 (1888)	7982	500.00	500.00	500.00	25,199.10	175.00
Do	Second	1897	5944 (1888)	7982	500.00	500.00	500.00	1,765.00	175.00
Do	Third	1898	5944 (1888)	7982	500.00	500.00	500.00	24,729.00	175.00
Do	Fourth	1899	5944 (1888)	7982	500.00	500.00	500.00	4,701.50	175.00
Do	First	1900	5944 (1888)	7982	500.00	500.00	500.00	25,776.95	175.00
Do	Second	1901	5944 (1888)	7982	500.00	500.00	500.00	1,711.20	175.00
Do	Third	1902	5944 (1888)	7982	500.00	500.00	500.00	25,470.20	175.00
Do	Fourth	1903	5944 (1888)	7982	500.00	500.00	500.00	1,745.70	175.00
Do	First	1904	5944 (1888)	7982	500.00	500.00	500.00	25,885.10	175.00
Do	Second	1905	5944 (1888)	7982	500.00	500.00	500.00	637.90	350.00
Do	Third	1906	5944 (1888)	7982	500.00	500.00	500.00	25,638.80	175.00
Do	Fourth	1907	5944 (1888)	7982	500.00	500.00	500.00	675.17	350.00
Do	First	1908	5944 (1888)	7982	500.00	500.00	500.00	25,667.12	175.00
Do	Second	1909	5944 (1888)	7982	500.00	500.00	500.00	25,865.94	350.00
Do	Third	1910	5944 (1888)	7982	500.00	500.00	500.00	250.51	199.25
Do	Fourth	1911	5944 (1888)	7982	500.00	500.00	500.00	175.00	175.00
Do	First	1912	5944 (1888)	7982	500.00	500.00	500.00	25,471.40	155.95
Do	Second	1913	5944 (1888)	7982	500.00	500.00	500.00	25,561.94	175.00
Do	Third	1914	5944 (1888)	7982	500.00	500.00	500.00		

1 Mo ko ho ko's Band.

ANNUITIES OF THE SAC AND FOX OF THE MISSISSIPPI.

Statement made from the accounts on file in the Treasury Department, Office of the Auditor for the Interior Department, etc.—Continued.

Agent.	Voucher.	Quarter.	Year.	Settlement and year.	Box.	No. of In- dians	Government.		Chiefs.	Per capita annuities.	Black- smith.
Do	17, 20, 35, 36, 42 to 46, 48, 84, 85, 91, 93, 98.	Fourth	1899	24481 (1899)			Kookuk. \$125.00	Che ko skuk.	Mahko-sal- toe. \$125.00		\$155.78
Do	29 to 31, 46, 56 to 58, 61 62, 63.	First	1900	25680 (1900)			125.00		125.00		175.00
Do	16, 25, 33, 37, 38, 53, 58 to 62.	Second	1900	27763 (1900)			135.00		125.00		175.00
Jno. R. Goodwin		Fourth	1898	7970 (1899)	646						
Do			1899	9549 (1899)	655						
S. T. Shipley			1899	8780 (1899)	653						
E. R. Roxbury				8790 (1899)	653						
Total							16,250.00	\$11,000.00	14,692.92	\$9,875.00	22,858.17

1 September 30, 1899.

2 December 31, 1899.

ANNUITIES OF THE SAC AND FOX OF THE MISSISSIPPI.

Agent.	Assistant blacksmith.	Gunsmith.	Physician and medicines.	Support of mission school.	Sac and Fox national account.	Iron, steel, and gun material.	Removal and establishing the Sac and Foxes—		Tobacco and salt.	Support of manual training school.	Carpenter.	Purchase of bonds.	Total.
H. W. Martin, Secretary of the Interior.													\$850.00
J. D. Cox, Secretary of the Interior.													34,886.17
A. Wiley.	\$150.00	\$400.00	\$600.00	\$1,256.25	\$1,345.84	\$147.17		\$24,886.17					17,740.98
Do.	150.00	400.00	400.00	422.35	545.84	116.78							19,912.67
Do.	150.00	400.00	400.00	1,644.18	1,148.45	100.00							20,715.17
T. Murphy.	112.50	400.00	600.00	467.00	1,086.86								19,496.86
A. Wiley.								\$997.69					997.69
T. Murphy.								513.62					513.62
E. Hoag.			400.00		49.09								15,239.09
Thos. Miller.			\$1,354.33	1,905.22	2,546.12			6,440.32					5,440.32
E. Hoag.	200.00	910.67						740.00					22,140.54
Thos. Miller.			\$200.00	1,788.28	4,312.69			1,198.75					1,198.75
E. Hoag.	175.00												15,200.97
Thos. Miller.			737.50										15,200.97
Do.													7,731.79
Do.			372.89										7,181.79
E. Hoag.	350.00		375.00						\$175.00				1,581.61
Columbus Delano, Secretary of the Interior.	350.00		\$200.00		774.75								6,527.67
Thos. Miller.													14,094.75
E. Hoag.													3,148.32
Thos. Miller.													668.38
E. Hoag.			700.00	50.00				1,689.48	350.00				2,689.48
J. Hadley.			\$200.00		2,421.01			8,624.00					24,536.67
E. Hoag.		808.33											2,905.43
J. Hadley.													5,245.90
Do.													29,990.79
E. Hoag.		400.00	750.00						175.00				925.00
J. Hadley.			750.00										23,837.12
E. Hoag.		400.00	200.00										3,125.69
J. Hadley.													67.44
E. Hoag.			750.00										2,814.17
J. Hadley.		400.00	\$200.00		3,905.56			1,564.17					24,252.98
Columbus Delano, Secretary of the Interior.													60,839.50

*Physicians interpreter's salary first and second quarters, 1870.

†Salary physician's interpreter.

‡Certificates of indebtedness.

§Including interpreter's pay.

ANNUITIES OF THE SAC AND FOX OF THE MISSISSIPPI.

Do	500.00	16.80	500.00	1,183.56	300.00	2,833.56
Do	250.00	78.91	250.00	598.10	175.00	19,080.90
Do	250.00	275.00	250.00	578.26	175.00	19,073.11
Do	275.00	67.50	275.00	628.47	175.00	1,323.97
Do	275.00		275.00	682.48	175.00	1,327.77
Do						16,748.43
Do						359.76
E. B. Townsend						25,512.74
Do	275.00		275.00	707.59	175.00	1,251.21
Jacob V. Carter	275.00		275.00	638.21	175.00	21,737.68
Do	500.00		500.00	1,008.45	175.00	21,744.70
Do	250.00		250.00	59.50	175.00	25,908.13
Do	250.00		250.00	545.80	175.00	15,458.60
Do	250.00		250.00		175.00	27,601.50
Do	250.00		250.00	230.00	350.00	569.53
Do	250.00		250.00	11.75	175.00	611.75
Do	250.00		250.00		175.00	600.00
Do	250.00		250.00		175.00	680.90
Do	250.00		250.00			711.55
Do	250.00		250.00			675.00
Do	250.00		250.00			22,292.11
Do	250.00		250.00			25,807.02
Do	250.00		250.00			32,267.45
Do	250.00		250.00			3,000.00
Do	250.00		250.00			9,010.31
Do	250.00		250.00			9,947.05
Do	250.00		250.00			29,698.10
Do	250.00		250.00			3,000.00
Do	250.00		250.00			3,188.10
Do	250.00		250.00			27,162.25
Do	250.00		250.00			7,790.89
Do	250.00		250.00			1,265.98
Do	250.00		250.00			24,861.60
Do	250.00		250.00			1,138.25
Do	250.00		250.00			7,897.70
Do	250.00		250.00			27,436.00
Do	250.00		250.00			27,894.45
Do	250.00		250.00			4,650.80
Do	250.00		250.00			26,894.55
Do	250.00		250.00			1,792.00
Do	250.00		250.00			1,080.00
Do	250.00		250.00			27,273.30
Do	250.00		250.00			4,680.60
Do	250.00		250.00			1,173.70
Do	250.00		250.00			2,081.54
Do	250.00		250.00			25,685.95
Do	250.00		250.00			1,404.00

1 Salary physician's interpreter.

SAC AND FOX INDIANS OF MISSISSIPPI IN IOWA VS.
ANNUITIES OF THE SAC AND FOX OF THE MISSISSIPPI.

Statement made from the accounts on file in the Treasury Department, Office of the Auditor for the Interior Department, etc.—Continued.

Agent.	Assistant blacksmith.	Gunsmith.	Physician and medicines.	Support of mission school.	Sac and Fox national account.	Iron, steel, and gun material.	Removal and establishing Sac and Foxes—		Tobacco and salt.	Support of manual-training school.	Carpenter.	Purchase of bonds.	Total.
E. L. Thomas			\$250.00		\$1,938.90			In new territory (art. 3, 6, 16, Ty. 1867).		\$36.00			\$4,141.00
Do			250.00		950.97			On lands in Kansas and payment debts (art. 4, 5, Ty. 1869).					1,105.97
Do			250.00		773.25					1,197.42			26,865.90
Do			250.00		750.00					1,714.42			2,685.12
Do			500.00		1,320.00								2,700.00
Do			250.00		675.00					1,385.41			2,735.41
Do			250.00		675.00					2,064.25			2,614.25
Do			250.00		675.00					364.13			26,619.23
Do			500.00		675.00								2,547.90
Do			250.00		725.00					1,653.94			3,653.94
Do			250.00		650.00								24,230.80
Do			500.00		650.00					3,041.62			5,666.79
Do			250.00		725.00								1,400.00
Do			250.00		725.00					1,621.36			3,621.21
Do			500.00		725.00								23,526.22
Do			500.00		900.00					3,279.49			5,645.43
Do			250.00		912.50								1,840.04
Do			250.00		725.00					1,623.60			3,023.60
Do			250.00		725.00					1,842.26			26,144.67
Do			250.00		1,174.98					1,540.53			3,339.27
Do			250.00		958.00								6,435.54
Do			250.00		5,779.76					1,564.44			4,970.42
Do			250.00		2,736.98								26,146.34
Do			14.54										300.00
Jno. R. Goodwin			250.00		1,047.78					1,671.10			250.00
Do													400.00
S. B. Shipley													400.00
E. R. Roxbury													450.00
Total	\$785.50	\$7,870.17	38,100.94	\$19,778.18	95,847.29	\$363.95	61,885.48	\$53,833.93	\$1,575.00	66,828.26	\$4,384.44	\$60,889.50	1,430,367.30

• Lee Patrick

ANNUITIES OF THE SAC AND FOX OF THE MISSISSIPPI.

EXHIBIT C.

Statement made from the accounts on file in the Treasury Department, Office of the Auditor for the Interior Department, rendered by disbursing officers for the Sac and Fox Agency, Iowa, from 1865 to December 31, 1899, showing the number of Indians of the Confederated Tribes of the Sac and Foxes of the Mississippi, and the annuities paid to or expended for them.

Agent.	Voucher.	Quarter.	Year.	Settlement and year.	Box.	Number of Indians.	Annuities.	Pay of farmers.	Agricultural implements.	Total.
Elijah Sells.			1865	5403 (1867)	618		\$5,359.06			145,359.06
L. Clark	10 and 11.	Second	1865	37 (1875)	845	264	5,965.12			6,965.12
Do	12.	Third.	1867	37 (1875)	845	247	5,598.46			5,598.46
Do		Fourth.	1867	37 (1875)	845	212	3,668.91			3,668.91
Do		Second	1868	37 (1875)	845	252	7,572.13			7,572.13
Do		Fourth.	1868	37 (1875)	845	253	5,599.96			5,599.96
Do		Second	1869	37 (1875)	845	252	5,579.76			5,579.76
Do		Fourth.	1869	37 (1875)	845	208	5,567.80			5,567.80
Do		Second	1869	7889 (1873)	771	268	5,567.80			5,567.80
Lieut. F. D. Garretty.			1870	7889 (1873)	771	295	5,567.30			5,567.30
Do		Fourth.	1870	15 (1875)	844	295	5,565.57			5,565.57
L. Clark.			1871	15 (1875)	844	308	5,560.20			5,560.20
Do		Second	1871	15 (1875)	844	317	5,585.54			5,585.54
Do		Fourth.	1872	15 (1875)	844	316	5,577.40			5,577.40
Do		Second	1872	4438 (1877)	1071	329	5,595.00			5,595.00
Do		Fourth.	1872	4438 (1877)	1071	329	5,595.00			5,595.00
A. R. Howbert.			1873	4438 (1877)	1071	335	5,025.00	\$400.00		5,091.68
Do		Third.	1873	4438 (1877)	1071	335	5,025.00	33.33		5,091.68
Do	7, 8, 9, 11, 12.	Fourth.	1873	4438 (1877)	1071	335	5,025.00	66.66		5,091.68
Do		First.	1874	4438 (1877)	1071	338	5,408.00	200.00		5,608.00
Do	3, 7, 9.	Second.	1874	4438 (1877)	1071	338	5,408.00	200.00		5,608.00
Do		Third.	1874	4438 (1877)	1071	346	5,190.00			5,190.00
Do	6.	Fourth.	1874	4438 (1877)	1071	346	5,190.00			5,190.00
Do	2, 3, 4, 5, 6.	Second.	1875	7902 (1878)	1166	342	5,087.33			5,087.33
Do	2, 3, 5, 6, 7.	Third.	1875	7902 (1878)	1166	342	5,087.33			5,087.33
Do	1, 2, 4, 5.	Fourth.	1875	7902 (1878)	1166	337	5,587.35			5,587.35
T. S. Free.			1875	7902 (1878)	1166	337	5,587.35			5,587.35
Do	3, 4, 5.	First.	1876	7902 (1878)	1166	341	5,587.33			5,587.33
Do	2, 4, and 5.	Second.	1876	7902 (1878)	1166	339	5,587.33			5,587.33
Do	3, 4, and 5.	Third.	1876	7902 (1878)	1166	311	5,587.33			5,587.33
Do	1, 2, 3, 4, 5, 6, 7.	Fourth.	1876	7902 (1878)	1166	311	5,587.33			5,587.33
Do	1, 2, 3, 4, 5, 6, 7.	First.	1877	4377 (1880)	1309	Lands.	2,000.28			2,000.28
Do	1, 2, 3, 4, 5, 6, 7.	Second.	1877	4377 (1880)	1309	Lands.	2,000.28			2,000.28
Do	1, 2, 3, 4, 5, 6, 7.	Third.	1877	4377 (1880)	1309	Lands.	2,000.28			2,000.28
Do	1, 2, 3, 4, 5, 6, 7.	Fourth.	1877	4377 (1880)	1309	Lands.	2,000.28			2,000.28
Do	1, 2, 3, 4, 5, 6, 7.	First.	1878	4377 (1880)	1309	Lands.	2,000.28			2,000.28
Do	1, 2, 3, 4, 5, 6, 7.	Second.	1878	4377 (1880)	1309	Lands.	2,000.28			2,000.28
Do	1, 2, 3, 4, 5, 6, 7.	Third.	1878	4377 (1880)	1309	Lands.	2,000.28			2,000.28
Do	1, 2, 3, 4, 5, 6, 7.	Fourth.	1878	4377 (1880)	1309	Lands.	2,000.28			2,000.28
Do	1, 2, 3, 4, 5, 6, 7.	First.	1879	4377 (1880)	1309	Lands.	2,000.28			2,000.28
Do	1, 2, 3, 4, 5, 6, 7.	Second.	1879	4377 (1880)	1309	Lands.	2,000.28			2,000.28
Do	1, 2, 3, 4, 5, 6, 7.	Third.	1879	4377 (1880)	1309	Lands.	2,000.28			2,000.28
Do	1, 2, 3, 4, 5, 6, 7.	Fourth.	1879	4377 (1880)	1309	Lands.	2,000.28			2,000.28
G. L. Davenport.			1880	5499 (1892)	1617		497.05			497.05
Do	2, 3, 4, 5.	First.	1880	5499 (1892)	1617		497.05			497.05

1 Goods and traveling expenses.

ANNUITIES OF THE SAC AND FOX OF THE MISSISSIPPI.

Statement made from the accounts on file in the Treasury Department, Office of the Auditor for the Interior Department, etc.—Continued.

Agent.	Voucher.	Quarter.	Year.	Settlement and year.	Box.	Number of Indians.	Annuities.	Pay of farmers.	Agricultural implements.	Total.
G. L. Davenport.		Second	1880	5499 (1882)	1817		\$367.95			\$367.95
Do		Third	1880	5499 (1882)	1817		237.50			237.50
Do		Fourth	1880	5499 (1882)	1817		266.00			266.00
Do		First.	1881	5499 (1882)	1817		225.00			225.00
Do	5.	Second	1881	8779 (1883)	1801		276.00			276.00
Do	6.	Third	1881	8779 (1883)	1801		200.00			200.00
Do	4, 7.	Fourth	1881	8779 (1883)	1801		254.50			254.50
Do	2.	First.	1882	8779 (1883)	1801		12.50			12.50
Do	7.	Second	1882	8779 (1883)	1801		425.00			425.00
Do	1.	Third	1882	8779 (1883)	1801		187.50			187.50
Do	10.	Fourth	1882	1362 (1884)	1859		176.00			176.00
Do	2.	First.	1883	1362 (1884)	1859		150.00			150.00
Do	Special, 1.	Second	1883	1366 (1884)	1860	300	20,000.00			20,000.00
Do	Special, 1, 2.	Third	1883	1366 (1884)	1860	350	18,559.95			18,559.95
Do	Special, 1.	Fourth	1883	1366 (1884)	1860	348	9,654.96			9,654.96
Do	Special, 1.	Second	1883	1366 (1884)	1860	Lands.	9,276.81			9,276.81
Do	3.	Third	1883	5101 (1885)	2167	Employees.	194.98			194.98
Do	1.	Fourth	1883	5101 (1885)	2167	Employees.	325.00			325.00
Do	3.	First.	1888	5101 (1885)	2167	Employees.	265.00			265.00
Do	7.	Second	1883	5101 (1885)	2167	Employees.	10,910.64			10,910.64
E. B. Townsend.		Fourth	1884	1502 (1884)	2167	Employees.	176.00			176.00
G. L. Davenport.		First.	1884	5101 (1885)	2167	Employees.	235.00			235.00
Do	1, 4.	Second	1884	5101 (1885)	2167	Employees.	145.00			145.00
Do	1.	Third	1884	5101 (1885)	2167	Employees.	6,384.66			6,384.66
Do	3, 4, 7 to 11.	Fourth	1884	5101 (1885)	2167	Employees.	145.00			145.00
O. H. Mills.		Second	1885	7478 (1886)		Employees.	19,691.30			19,691.30
W. H. Black.		Fourth	1885	9058 (1886)		Employees.	18,165.01			18,165.01
Do	1, 2.	Second	1886	372 (1887)	2547		14,898.08			14,898.08
Do	1, 2, 3, 4.	Fourth	1886	4436 (1888)	2926		15,116.22			15,116.22
H. Heth.		First.	1889	4095 (1893)	3201		17,080.71			17,080.71
E. Gheen.		Second	1889	9854 (1890)	3221		15,497.23			15,497.23
Do	3.	Fourth	1890	9854 (1890)	3221		16,573.96			16,573.96
W. E. Lesser.		Second	1891	981 (1890)	3227	402	16,642.96			16,642.96
Do	5.	Fourth	1891	6807 (1892)	3854		43.71			43.71
Do	8.	First.	1892	278 (1893)	3860		16,145.05			16,145.05
Do	1, 4.	Third	1892	278 (1893)	3860		16,171.12			16,171.12
Do	5, 1, 4.	First.	1893	5725 (1894)	4197		16,149.92			16,149.92
Do	1.	Fourth	1894	1631 (1895)	4379	405	16,106.25			16,106.25
H. M. Rebo.		Second	1894	3178 (1895)	4490	410	16,152.77			16,152.77
Do	4.	First.	1896	5836 (1896)	4653	418	16,047.54			16,047.54
Do	1, 11.	Fourth	1896	9643 (1896)	4960		74.49			74.49
Do	1, 3, 6.	First.	1897	10712 (1896)	4960	413	16,116.74			16,116.74

ANNUITIES OF THE SAC AND FOX OF THE MISSISSIPPI.

Do	2, 13.	First.	1898	15660 (1898)	5066	408	\$5,237.40	.....	.....	5,237.40
Do	20	Second	1898	16053 (1898)	.....	.....	5,355.84	.....	.....	5,355.84
Do	18	Third	1898	17223 (1898)	.....	411	5,351.45	.....	.....	5,351.45
Do	37, 38.	Fourth	1898	19631 (1898)	.....	.....	431.03	.....	.....	431.03
Do	25	First	1899	20256 (1899)	.....	388	5,626.66	.....	.....	5,626.66
Do	41	Second	1899	23153 (1899)	.....	.....	44.24	.....	.....	44.24
Do	23	Third	1899	23109 (1899)	.....	394	3,648.02	.....	.....	3,648.02
Do	37	Fourth	1899	24643 (1899)	.....	.....	239.36	.....	.....	239.36
Do	22	First	1900	25786 (1900)	.....	395	3,047.10	.....	.....	3,047.10
Do	40	Second	1900	27783 (1900)	.....	.....	646.41	.....	.....	646.41
W. G. Main										
Do										
Do										
Do										
Do										
Do										
Total							448,387.50	\$899.96	454.79	449,092.28

SIR: I am in receipt of a letter from the Auditor for the Interior Department, dated the 30th ultimo, requesting that he be furnished with the best information afforded by this Department, showing the number of Sac and Fox Indians residing in the State of Iowa each year from 1855 to 1866, inclusive, to enable you to comply with the direction of the House of Representatives, as contained in resolution of June 6 last, in the matters of the confederated tribes of the Sac and Fox Indians of the Mississippi.

In reply to the request of the Auditor I regret to have to report that accurate or reliable data as to the number of the Iowa branch of the Sac and Fox tribe from 1855 to 1866 is not at hand. In 1896, in compliance with a provision contained in the Indian appropriation bill for the fiscal year 1896 (act of Mar. 2, 1895, 28 Stat., pp. 876-903) on the same subject, a report was submitted to Congress (See Senate Doc. 167, Fifty-fourth Congress, first session), when exhaustive researches were made by the Department to ascertain the number of Sac and Fox Indians in Iowa. So far as known, no census of said Indians was taken in 1856 or 1857, or any other year after they returned to Iowa in 1855, until many years thereafter, when the United States caused such census or enrollment to be made.

An act of the legislature of the State of Iowa, approved July 15, 1856, allowed certain Sacs and Foxes then residing in Tama County to remain and reside in said State; also directed the sheriff of said county to take a census of said Sacs and Foxes then residing there, giving their names and sex, which list was to be filed in his office. This census was never taken.

Mr. George L. Davenport, under date of September 12, 1862, reported to Governor Kirkwood, of Iowa, by whom he had been appointed to examine into the condition of the Sacs and Foxes then residing in the State, that they numbered at that time 69 men, 65 women, and 51 children, or a total of 185, who had "returned from Kansas Territory eight years ago and brought with them \$800 saved out of their annuities for that year. * * * They have not received any of their annuities for seven years." This fixes the date of their separation from the nation at about 1854, and in that year they received their last annuities jointly with the nation, although some of them may at irregular periods have returned temporarily to the agency in Kansas and been enrolled and received annuities with the main body of the tribe.

From the examination made by the Department it appears that a number of Sacs and Foxes left Kansas and joined their brethren in Iowa after 1862. The record shows that 1,341 persons were paid at the agency in Kansas in the winter of 1861; 1,180 early in 1862; 1,098 late in that year, and 996 in 1863, or an apparent decrease of 345 from the winter of 1861 to early in 1863, a period of some eighteen months. No special reasons or causes are assigned for this decrease, nor is it conclusive that all of these persons went to Iowa; but by affidavits submitted about the time of the above-named examina-

tion it was claimed that 77 arrived in Tama County in 1862, after September in that year, and it is reasonable to suppose that they were part of the 345 who had apparently left Kansas, as stated. According to the report of Mr. Davenport, the 185 found by him on his visit in 1862 had been living in Tama County for eight years, and it appears that his visit was made prior to the arrival of the 77 mentioned.

At the first payment of the Indians made in the spring of 1867, 264 were enrolled.

The Department is convinced that the number (185) reported by Mr. Davenport in 1862 is approximately correct. No doubt there were some accessions from Kansas from 1862 to 1866, and also some increase from natural causes, and after a thorough examination of the records of the Indian Office and of the Department, it is believed that the average number of Sac and Fox Indians in Iowa from 1855 to 1862, both inclusive, was about 160, and from 1863 to 1866, both inclusive, about 225.

Very respectfully,

E. A. HITCHCOCK, *Secretary.*

The Secretary of the Treasury.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
WASHINGTON, *October 20, 1900.*

SIR: In compliance with the request of Mr. R. V. Belt, of this city, there are transmitted herewith 9 affidavits filed by him in this office in connection with a claim in favor of the Sac and Fox Indians of the Mississippi.

Very respectfully,

A. C. TONNER,
Acting Commissioner.

The Auditor for the Interior Department.

STATE OF IOWA,

Tama County, ss:

I, Mau Sau Pe Pau Tau, on oath depose and say that I am one of the Sac and Fox Indians who returned from Kansas to Iowa in the year A. D. 1862, at which time I was 20 years of age, and that I know that the number of Indians of said tribe that came to Iowa in said year, being at the time I returned, was 77; that I am making this affidavit from personal knowledge and that I am yet a member of the tribe.

Signed at Toledo, Iowa, this 29th day of January, A. D. 1900.
MAU SAU PE (his x mark) PAU TAU.

Witnessed by—

H. J. STIGER.

CHAS. BENESH.

LUELLA VAMER.

Subscribed and sworn to before me and in my presence by Mau Sau Pe Pau Tau this 29th day of January, A. D. 1900.

[SEAL.]

H. J. STIGER.

Notary Public Within and for Tama County, Iowa.

I, Joseph Tesson, official interpreter of the Sac and Fox Indians of the Mississippi in Iowa, hereby certify that I have explained the above and foregoing affidavit to Mau Sau Pe Pau Tau fully and made him acquainted with the statements therein contained prior to his signing the same.

JOSEPH TESSON, *Interpreter.*

STATE OF IOWA,

Tama County, ss:

I, Al Ama T, on oath depose and say that I was one of the Indians that returned from Kansas to Iowa in the year A. D. 1863, at which time I was 13 years of age, and that I know that the number 140 of Indians of said tribe that came to Iowa in said year, being at the time I returned, was 42; that I am making this affidavit from personal knowledge and that I am yet a member of the tribe.

Signed at Toledo, Iowa, this 29th day of January, A. D. 1900.

AL (his x mark) AMA T.

Witnessed by—

H. J. STIGER.

CHAS. BENESH.

LUELLA VARNER.

Subscribed and sworn to before me and in my presence by Al Ama T this 29th day of January, A. D. 1900.

[SEAL.]

H. J. STIGER,

Notary Public Within and for Tama County, Iowa.

I, Joseph Tesson, official interpreter of the Sac and Fox Indians of the Mississippi in the State of Iowa, hereby certify that I have explained the above and foregoing affidavit to Al Ama T fully and made him acquainted with the statements therein contained prior to his signing the same.

JOSEPH TESSON, *Interpreter.*

STATE OF IOWA,

Tama County, ss:

I, Wa Pe No Ka, on oath depose and say that I am one of the Sac and Fox Indians who returned from Kansas to Iowa in the year A. D. 1863, at which time I was 28 years of age, and that I know that the number of Indians of said tribe who came to Iowa in said year, being at the time I returned, was 42; that I am making this affidavit from personal knowledge and that I am yet a member of the said tribe.

Signed at Toledo, Iowa, this 29th day of January, A. D. 1900.

WA PE NO (his x mark) KA.

Witnessed by—

H. J. STIGER.

CHAS. BEUESH.

LUELLA VARNER.

Subscribed and sworn to before me and in my presence by Wa Pe No Ka this 29th day of January, A. D. 1900.

[SEAL.]

H. J. STIGER,

Notary Public Within and for Tama County, Iowa.

I, Joseph Tesson, official interpreter of the Sac and Fox Indians of the Mississippi in the State of Iowa, hereby certify that I have explained the above and foregoing affidavit to Wa Pe No Ka fully and made him acquainted with the statements therein contained prior to signing the same.

JOSEPH TESSON, *Interpreter.*

STATE OF IOWA,

Tama County, ss:

I, Nee Shu Ma Ne, on oath depose and say that I am one of the Sac and Fox Indians that returned from Kansas to Iowa in the year A. D. 1864, at which time I was 14 years of age, and that I know that the number of Indians of said tribe that came to Iowa in said year, being the year that I returned, was 13; that I am making this affidavit from personal knowledge, and that I am yet a member of the tribe.

Signed at Toledo, Iowa, this 29th day of January, A. D. 1900.

NEE SHU (his x mark) MA NE.

Witnessed by—

H. J. STIGER.

CHAS. BENESH.

LUELLA VARNER.

Subscribed and sworn to before me and in my presence by Nee Shu Me Ne on this 29th day of January, A. D. 1900.

[SEAL.]

H. J. STIGER,

Notary Public Within and for Tama County, Iowa.

I, Joseph Tesson, official interpreter of the Sac and Fox Indians of the Mississippi in the State of Iowa, hereby certify that I have explained the above and foregoing affidavit to Nee Shu Ma Ne fully and made him acquainted with the statements therein contained prior to his signing the same.

JOSEPH TESSON, *Interpreter.*

141 STATE OF IOWA,

Tama County, ss:

I, Pa Pa Ke, being duly sworn, depose and say that I was one of the Indians of the Sac and Fox of Iowa who returned to Iowa from Kansas in the year A. D. 1865, at which time I was 12 years of age, and that I know that the number of Indians of said tribe that came to Iowa in said year, being at the time that I returned, was 12;

that I make this affidavit from personal knowledge, and that I am yet a member of the tribe.

Signed at Toledo, Iowa, this 29th day of January, A. D. 1900.

PA PA (his x mark) KE.

Witnessed by—

H. J. STIGER.
CHAS. BENESH.
LUELLA VARNER.

Subscribed and sworn to before me and in my presence by Pa Pa Ke Wa this 29th day of January, A. D. 1900.

[SEAL.]

H. J. STIGER,
Notary Public in and for Tama County, Iowa.

I, Joseph Tesson, official interpreter of the Sac and Fox Indians of the Mississippi in the State of Iowa, hereby certify that I have explained the above and foregoing affidavit to Pa Pa Ke Wa fully and made him acquainted with the statements therein contained before his signing the same.

JOSEPH TESSON, *Interpreter.*

STATE OF IOWA,

Tama County, ss:

I, Pa Ha She Qua, on oath depose and say that I was one of the Sac and Fox Indians that originally returned to Iowa in the year A. D. 1855, at which time I was 14 years of age, and I know that the number of Indians of said tribe that came from Kansas in the year A. D. 1855 and the other years after that time to be as follows, and as now stated by me, namely, in 1855, 144 Sac and Fox Indians came to Tama County, Iowa; in 1862, 77 Sac and Fox Indians came to Tama County, Iowa; in 1863, 42 Sac and Fox Indians came to Tama County, Iowa; in 1864, 13 Sac and Fox Indians came to Tama County, Iowa; in 1865, 12 Sac and Fox Indians came to Tama County, Iowa; in 1866, 22 Sac and Fox Indians came to Tama County, Iowa, making a total of 310 Sac and Fox Indians who returned from Kansas to Tama County, Iowa; that I have resided with said tribe in Tama County, Iowa, since my return in 1855, and am now a member of said tribe, and make the above affidavit and statements from personal knowledge.

Signed at Toledo, this 29th day of January, A. D. 1900.

PA HA (her x mark) SHE QUA.

Witnessed by—

H. J. STIGER.
CHAS. PENESH.
LUELLA VARNER.

Subscribed and sworn to before me and in my presence by Pa Ha She Qua this 29th day of January, A. D. 1899.

[SEAL.]

H. J. STIGER,
Notary Public within and for Tama County, Iowa.

I, Joseph Tesson, official interpreter of the Sac and Fox Indians of the Mississippi in the State of Iowa, hereby certify that I have explained the above and foregoing affidavit to Pa Ha She Qua fully, and made her acquainted with the statements therein contained prior to her signing the same.

JOSEPH TESSON, *Interpreter.*

STATE OF IOWA,

Tama County, ss:

I, Me No Qua, on oath depose and say that I was one of the Sac and Fox Indians that originally returned to Iowa in the year A. D. 1855, at which time I was 14 years of age, and I know that the number of Indians of said tribe that came from Kansas in the year A. D. 1855 and the other years after that time to be as follows and as now stated by me:

In 1855, 144 Sac and Fox Indians came to Tama County, Iowa; in 1862, 77 Sac and Fox Indians came to Tama County, Iowa; in 1863, 42 Sac and Fox Indians came to Tama County, Iowa; in 1864, 13 Sac and Fox Indians came to Tama County, Iowa; in 1865, 12 Sac and Fox Indians came to Tama County, Iowa; in

1866, 22 Sac and Fox Indians came to Tama County, Iowa, 142 making a total of 310 Sac and Fox Indians who returned from Kansas to Tama County, Iowa; that I have resided with said tribe in Tama County, Iowa, since my return in 1855, and am now a member of said tribe and make the above affidavit and statements from personal knowledge.

Signed at Toledo, Iowa, this 29th day of January, A. D. 1900.

ME NO (her x mark) QUA.

Witnessed by—

H. J. STIGER.

CHAS. BENESH.

LUELLA VARNER.

Subscribed and sworn to before me and in my presence by Me No Qua this 29th day of January, A. D. 1900.

[SEAL.]

H. J. STIGER,

Notary Public within and for Tama County, Iowa.

I, Joseph Tesson, official interpreter of the Sac and Fox Indians of the Mississippi in the State of Iowa, hereby certify that I have explained the above and foregoing affidavit to Me No Qua fully and made her acquainted with the statements therein contained prior to her signing the same.

JOSEPH TESSON, *Interpreter.*

STATE OF IOWA,

Tama County, ss:

I, Push E To Neke Qua, being first duly sworn, depose and say that a part of my duties as chief of the Sac and Fox Indians of Iowa is to keep in my possession a record of the enrollment and number of the Indians of the said tribe, and that such record has been kept

showing the number of the said tribe since their return from Kansas in the year A. D. 1855, and that said record, which is now in my possession, shows and states the enrollment and number of the Sac and Fox Indians of the Mississippi, in the State of Iowa, to be as follows, namely, that there returned from Kansas, in the year A. D. 1855, to Iowa 144 Indians; that said number had increased from the year A. D. 1855 to the end of the year A. D. 1862 until the enrollment and number of said tribe of Indians was 267; that at the end of the year A. D. 1863 the enrollment of said tribe was 303; that at the end of the year A. D. 1864 the enrollment and number of the said tribe had increased to 316; that at the end of the year A. D. 1865 the enrollment and number of the said tribe had increased to 327; that at the end of the year A. D. 1866 the enrollment and number of the Indians of the said tribe had increased to 354, and that said record as so kept and now in my possession referred to by me shows the births and deaths of the members of the said tribe, and is a record or enrollment of said tribe from the year A. D. 1855 down to and including the year 1866.

Signed at Toledo, Iowa, this 29th day of January, A. D. 1900.

PUSH E TO (his x mark) NEKE QUA.

Witnessed by—

H. J. STIGER.

CHAS. BENESH.

LUELLA VARNER.

Subscribed and sworn to before me and in my presence by Push E To Neke Qua this 29th day of January, A. D. 1900.

[SEAL.]

H. J. STIGER,

Notary Public within and for Tama County, Iowa.

I, Joseph Tesson, official interpreter of the Sac and Fox Indians of the Mississippi in the State of Iowa, hereby certify that I have explained the above and foregoing affidavit to Push E To Neke Qua fully and made him acquainted with the statements therein contained prior to his signing the same.

JOSEPH TESSON, *Interpreter.*

STATE OF IOWA,

Tama County, ss:

I, Push E To Neke Qua, on oath depose and say that I am now, and have been since the fall of A. D. 1881, the chief of the Sac and Fox Indians of the Mississippi in Iowa, and have acted as such chief and performed the duties of chief of said tribe of Indians during all of said time; that the first band of Indians returned from Kansas in the year A. D. 1855; that there returned with them Ma Sha Na, who was and acted as chief of the Sac and Fox Indians of the Mississippi in Iowa from the said year A. D. 1855, until some time in 1862, when Mau Min Wau Ne Ka returned from Kansas with other Indians to Iowa, and that on the return of the said Mau Min Wau Ne Ka from Kansas the said Ma Sha Na retired and resigned as chief, and the said Mau Min Wau Ne Ka

became and did act as the chief of the said Sac and Fox Indians of the Mississippi in Iowa from the year A. D. 1862, as aforesaid, until his death in January, A. D. 1881; that after the death of the said Mau Min Wau Ne Ka, his son Ke Wau Tau Qua, was elected and acted as chief until some time in the fall of the said year A. D. 1881, when the said Ke Wau Tau Qua died, and this affiant, Push E To Neke Qua, after the death of the said Ke Wau Tau Qua, was elected chief of the said Sac and Fox Indians of the Mississippi in Iowa, accepted said trust, and has acted as such chief as heretofore stated, ever since said date, and is now acting as the chief of the Sac and Fox Indians of the Mississippi in Iowa; that as provided by the fourth article of the treaty of 1842, made with the United States of America and the Sac and Fox Indians of the Mississippi, it was agreed that there should be paid \$500 per annum as salary and compensation to the chief of the Sac and Fox Indians, and your affiant states that he has never received any compensation under said treaty from the United States Government, and that there has been no compensation paid to any of his predecessors; that there is due from the United States Government, as provided in said Article IV of the treaty of 1842, \$500 per annum from the year A. D. 1855, to the present time, namely, A. D. 1900; that there is due to this affiant, Push E To Neke Qua, as chief of the said Sac and Fox Indians of the Mississippi in Iowa, from the time of his election in A. D. 1881 to A. D. 1900, nineteen years, at \$500 per annum, or \$9,500, and he asks for the payment to him of that sum; there is also due his predecessor, Mau Min Wau Ne Ka, for the period from the year A. D. 1862 to the year A. D. 1881, making a total of nineteen years, at \$500 per annum, the sum of \$9,500, and he asks for the payment of the said sum to him; and there is also due to his predecessor Ma Sha Na from the year A. D. 1855 to the year A. D. 1862, being a period of seven years, at \$500 per annum, the sum of \$3,500, making a total due this affiant of \$22,500, as herein stated, which this affiant respectfully asks be allowed and paid to him for the reasons stated in this affidavit.

Signed at Toledo, Iowa, this 29th day of January, A. D. 1900.

PUSH E (his x mark) TO NEKE QUA.

Witnessed by—

H. J. STIGER.

CHAS. BENESH.

LUELLA VARNER.

Subscribed and sworn to before me and in my presence by Push E To Neke Qua this 29th day of January, A. D. 1900.

[SEAL.]

H. J. STIGER,

Notary Public within and for Tama County, Iowa.

I, Joseph Tesson, official interpreter of the Sac and Fox Indians of the Mississippi in Iowa, hereby certify that I have explained the above and foregoing affidavit to Push E To Neke Qua fully, and made him acquainted with the statements therein contained prior to his signing the same.

JOSEPH TESSON, *Interpreter.*

SAC AND FOX AGENCY, IOWA,
TOLEDO, TAMA COUNTY, IOWA.

Whereas, by provision in the Indian appropriation act of March 2, 1895 (28 Stat., 896), Congress directed the Secretary of the Interior to examine the claims of the Sac and Fox Indians of the Mississippi residing in the State of Iowa for the payment of annuities and other sums from the tribal funds, and to ascertain and report to Congress what, if any, sums are justly due them from the tribal funds by reason of any unequal distribution of tribal annuities, land funds, or funds from other sources. And,

Whereas Hon. Hoke Smith, Secretary of the Interior, did report to Congress on the subject in 1896, as will be seen by Senate Doc. No. 167, Fifty-fourth Congress, first session, wherein he reported no allowance on the items of claims of the claimant Indians, as follows:

"First. For their proportionate shares of the tribal annuities for the period from 1853 to 1886, inclusive, amounting to \$143,745.80.

"Second. For their proportionate shares of the tribal annuities for the period from 1867-1894, both inclusive, allowing them for that period for their proportion of the \$5,000 for support of manual-labor school, of the \$5,000 for national government of the tribe, and of the amount used for physicians and medicines; the amount of this item of their claim will be about \$157,180.45."

That said Hon. Hoke Smith, Secretary of the Interior,
144 only reported favorably on the item of the claim of the claimant Indians for their just proportion of the \$147,393.32, appropriated by Congress in payment for lands ceded by the tribe under the treaty of 1867, allowing them the sum of \$42,893.25, which sum was paid to the claimant Indians, by adjustment on the books of the Treasury, under legislation of Congress on said report so made to it by said Secretary of the Interior, all of which will be more fully seen by reference to the Senate Doc. No. 167, above referred to. And,

Whereas, said claimant Indians are not satisfied with the decision of said Secretary of the Interior on their said claims, in so far as no allowance was recommended by him, and firmly believing as they do that said claims are meritorious and that considerable sums are justly due to them from the tribal estate, and desiring that said claims shall be further considered by the proper committees of Congress, or by such other proper tribunal as Congress may decide to commit them for adjustment: Now, therefore,

Be it resolved by the Sac and Fox Indians of the Mississippi, residing in the State of Iowa, in council duly called and assembled at the usual place for holding such councils, and according to the customs of the tribe, for the special consideration of this subject, That we do hereby petition and appeal to the Congress of the United States to give further consideration to our said claims upon which no allowance was reported as aforesaid in Senate Doc. No. 167, Fifty-fourth Congress, first session, by the Hon. Hoke Smith, Secretary of the Interior; that said claims be considered by the appropriate committees of Congress, or by such other tribunal as Congress may elect

to intrust the adjustment of said claims according to the principles of equity and justice.

Resolved further, That Hon. R. V. Belt, attorney at law, of Washington, D. C., is hereby recognized, authorized, and retained and employed as the attorney for said claimant Indians for the prosecution of this their petition and appeal to Congress, and for the further prosecution of their said claims before the committees of Congress, or before any other tribunal to which Congress shall commit the adjustment of said claims, and that he shall be entitled to receive for his said services a sum equal to 15 per cent "of any and all sums recovered to be paid to said claimant Indians or placed to their credit in the Treasury of the United States in the final adjustment of their said claims, together with such additional sum or sums as he may show to have been incurred as expenses in the prosecution of said claims on behalf of the claimant Indians; and that Congress, or whatever tribunal may, under its authority," finally adjust said claims, is hereby authorized to cause payment to be made to our said attorney in accordance herewith.

Done this 6th day of November, 1899.

PUSH E TO NEKE QUA (his x mark),
Chief and President of Council.

KA PA YOU,
Secretary of Council Pro Tem.

JOSEPH TESSON,
Interpreter for Council.

I hereby certify that I was present at the council and interpreted to it the foregoing resolutions, and that the same were adopted as the unanimous voice of the council after they had been fully discussed and understood; I further certify that there were present at said council a large majority of the adult male Indians of the tribe, and that the time and place for the holding of the council was made known in due time previous to the assembling thereof, according to the customs of the tribe.

JOSEPH TESSON,
Interpreter for Tribe.

Sac and Fox Agency, Iowa, November 6, 1899.

Attested by—

OU A WOT (his x mark), *Second Chief*,
WA PELLU KA (his x mark),
NE SHO MON NEE (his x mark),
NA SAH PA RHIA (his x mark),
KA PA YOE (his x mark),
SHA WA TAH (his x mark),
SHA WA NAH QUA HUK QUA (his x mark),
PA TO KA (his x mark),
CHA KA TA CO SEE (his x mark),
Members Council.

Witnesses as to all signers on this page:

WM. G. MALIN.

F. S. LELAND.

54th Congress, 1st Session.

• Document No. 167.

In the Senate of the United States.

March 13, 1896.—Referred to the Committee on Indian Affairs and ordered to be printed.

The Vice-President presented the following

Letter from the Secretary of the Interior, Transmitting Statement of Account Relative to the Claim of the Sac and Fox Indians of Mississippi, Now Residing in the State of Iowa.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, March 12, 1896.

SIR: I have the honor to herewith transmit a statement of the claim of the Sac and Fox Indians of the Mississippi, now residing in the State of Iowa, prepared in conformity with the provisions of the act of March 2, 1895 (28 U. S. Stat. L., 876-903).

By this statement it will be seen that the sum of \$42,893.25 is found due this band of the Sacs and Foxes of the Mississippi, payable from funds belonging to the tribe.

Besides the annuities accruing to the tribe under various treaties, there is also the sum of \$55,058.21 now to their credit in the Treasury, in cash, upon which interest at the rate of 5 per cent is annually paid to them under the provisions of the act of April 1, 1880 (21 U. S. Stat. L., 70).

As a method of settlement of the aforesaid indebtedness of the tribe to the Iowa branch one of the following plans is recommended, viz:

First. That authority be granted by Congress for this Department to pay to the Iowa Sacs and Foxes the sum of \$42,893.25 out of the aforesaid tribal fund of \$55,058.21, with accrued interest thereon from January 1, 1896, to date of payment.

Second. That the Secretary of the Treasury be authorized and directed to transfer on the books of his Department \$42,893.25 to the credit of the Iowa Sacs and Foxes, from the tribal fund of \$55,058.21, interest thereon at the rate of 5 per cent per annum to begin on January 1, 1896.

Third. That a sum not exceeding \$4,289.32 be annually retained from the proportionate share of the annuities due the Sac and Fox of the Mississippi tribe of Indians under their several treaties, the same to be paid to the Iowa branch of said tribe in addition to their proportionate share of the tribal annuities until the indebtedness of the latter against the former shall be liquidated, and that interest at the rate of 5 per cent per annum from January 1, 1896, shall be allowed on deferred payments, to be paid from the income on the invested fund (\$55,058.21) of the tribe now in the Treasury.

Of these three plans I recommend the adoption of the second one as being just to both parties.

146 In accordance with the requirements of the aforesaid act of March 2, 1895, directing that full opportunity to be heard be given to all parties interested, notice was given to the memorialists, through their attorney, of the finding in their behalf, and also to the Oklahoma branch of the tribe of the finding against them.

The attorney for the former filed protest in behalf of the memorialists, the objections to said finding being set out in the inclosed copy of a communication from Messrs. J. M. Vale and R. V. Belt, dated February 6, 1896.

A copy of Department answer thereto, dated the 12th instant, confirming the finding, is also herewith inclosed.

The Oklahoma Sacs and Foxes, through their delegates Mah ko sha toe and Moses Keokuk, also filed protest against the said finding, but have since, orally, through the delegates named, now in this city, withdrawn their objections to the aforesaid "Statement of account."

Very respectfully,

HOKE SMITH, *Secretary.*

The President of the Senate.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *January 30, 1896.*

SIR: I herewith hand you, as attorney for that branch of the Sac and Fox of the Mississippi tribe of Indians, residing in the State of Iowa, a copy of an account prepared in the Department, in conformity with the provisions of the act of March 2, 1895, of their claims for their shares of the tribal annuities under the several treaties with the tribe.

Notice of this accounting has been given to the Oklahoma branch of the tribe, and they have been requested to file their objections thereto, if any, within a reasonable time.

Very respectfully,

HOKE SMITH, *Secretary.*

Mr. J. M. Vale, Atlantic Building, City.

Statement of Account, Prepared in the Office of the Secretary of the Interior, in Conformity with the Following Provision Contained in the Indian Appropriation Bill for the Fiscal Year Ending June 30, 1896 (Act of March 2, 1895, 28 Stat. L., 876-903), to wit:

That the Secretary of the Interior be, and he is hereby, directed to examine the claim of the Sac and Fox Indians of Mississippi, now residing in the State of Iowa, as set forth in their memorial presented to Congress (Senate Miscellaneous Document Numbered Forty-eight, Fifty-third Congress, third session), for the payment of annuities and other sums from the tribal funds of said Sac and Fox Indians of Mississippi and any and all claims of that portion of the tribe residing in Iowa, and to ascertain whether, under any treaties or acts of Congress, any amount is justly due them as a portion of said tribe from those of said tribe now in Oklahoma by reason of any unequal distribution of tribal annuities, land funds, or funds from other sources; and if so, how much, giving full opportunity to all

parties in interest to be heard, and to report his conclusions to Congress at the next assembling thereof.

The claims of the Iowa branch of the Sacs and Foxes, as set out and described in the above-named Senate document, consist of the following items, viz:

First Claim.—“For their proportionate shares of the tribal annuities from 1853 to 1866, both inclusive,” amounting to \$143,745.80.

Specification.—“From the time of the return to Iowa of that portion of the Sac and Fox Indians of Mississippi now residing in that State, ‘twelve or fifteen years’ prior to 1867, they received no portion of the tribal annuities and no aid or support from the United States. They were not during that time, have not since been, and are not now supported by the United States, but support themselves with the aid of the portion of the tribal annuities received since the year 1867. Prior to 1867 those of the tribe residing in the State of Kansas received the whole of the tribal annuities. The aggregate of the payments made during that period, say, from 1853 to 1866, both inclusive,” is \$859,835.42.

Second Claim.—“For their just proportionate shares of the tribal annuities for the period from 1867 to 1894, both inclusive, allowing them for said period their proportionate share of the \$5,000 for support of manual-labor school, of the \$5,000 for national government of the tribe, and of the amount used for physicians and medicines the amount of this item of their claim will be about \$157,183.45.”

Specification.—“For the period from 1867 to 1894, both inclusive, twenty-eight years, the tribal annuities have aggregated the sum of \$1,428,000. Of that sum those of the tribe residing in the State of Iowa have received * * * in cash annuity payments and in expenditures made for their benefit the total sum of \$354,508.76. During the same period those in Kansas, subsequently removed to Oklahoma, have received in cash annuity payments and in expenditures for their benefit \$1,063,491.24.

“During said period, from 1867 to 1894, both inclusive, the aggregate per capita payments made to those in Kansas, afterwards removed to Oklahoma, is 21,265 (taking the number for 1866 for the number of 1867, no number being given for the latter year), and to those in Iowa is 11,875, an aggregate of 33,140 per capita payments. The aggregate of the annuities for that period is \$1,428,000, of which those in Iowa should have received 11875/33140, equal to \$511,692.21; whereas during said period they have only received \$354,508.76, showing a difference against them of \$157,183.45.”

Third Claim.—“That there is justly due them from the appropriation of \$147,393.32 for land ceded by the treaty of 1867 at least \$50,302.84, with interest thereon at 5 per cent from 1873, amounting to \$57,848.27, and that there should be a readjustment of the interest payments on the balance remaining of said ceded land appropriation consequent upon the allowance and payment of this last item of their claim.”

Specification.—“By the treaty of 1867 all the lands of the reser-

vation in Kansas not ceded by the treaty of 1859 were ceded to the United States for the sum of \$147,393.32." Of said sum, \$92,335.21 "went to the use and benefit of those members of the tribe then residing in the State of Kansas, whose removal to a reservation where they now reside in Oklahoma was provided for in the treaty of 1867"—equal to a per capita of \$172.57. "On this basis those of the tribe residing in Iowa should have received \$50,302.84," still leaving a balance remaining of the above-named fund of \$4,755.27, subject to distribution between all the members of the tribe—both those residing in Oklahoma and in Iowa.

There are other specifications set out in the memorial which might be classed as "general," which will be taken up and referred to later.

The specific claims of the Iowa branch for their share of the tribal annuities and of proceeds of lands sold arise under the following treaties and acts of Congress, viz:

Treaty of 1804.—By the third article of this treaty (7 Stat. L., p. 84) goods "suited to their circumstances," guaranteed to them by article 14 of the treaty of January 9, 1789 (7 Stat. L., p. 28), to the value of \$1,000, were to be furnished yearly to the Sacs and Foxes, in consideration of the cession and relinquishment of certain lands described in the second article of the treaty.

Treaty of 1837.—By section 9 of article 2 of the treaty of October 21, 1837 (7 Stat. L., p. 540), the United States guaranteed to the Sacs and Foxes an annual income of not less than 5 per cent on the sum of \$200,000 "to be paid to them each year, in the manner annuities are paid," in consideration of the cession of certain lands provided for in the first article of the treaty.

Treaty of 1842.—Article 2 of this treaty (7 Stat. L., p. 596) guaranteed the Indians an annual "interest of 5 per cent on \$800,000," in part consideration for lands ceded by the first article of the treaty.

Treaty of 1859.—The sale of certain surplus lands described in articles 1, 2, and 3 is provided for in article 4 of the treaty of October 1, 1859 (15 Stat. L., 467), the proceeds thereof to be used in the payment of certain debts of the tribe. (See article 5.)

148 *Treaty of 1867.*—By article 3 of the treaty of February 18, 1867 (15 Stat. L., 495), the United States agreed to pay the Sacs and Foxes at the rate of \$1 per acre for the whole tract of land ceded by articles 1 and 2 of the treaty, said land being subsequently ascertained to contain 147,393.32 acres.

Act of April 10, 1869.—By this act (16 Stat. L., 35) Congress appropriated the sum of \$147,393.32, being at the rate of \$1 per acre, to pay for the lands above mentioned.

Annuities.—The tribal annuities aggregate \$51,000 per annum, and arise as follows, as per treaties noted above, viz:

Article 3, treaty of 1804.....	\$1,000
Article 2, treaty of 1837.....	10,000
Article 2, treaty of 1842.....	40,000
Total	51,000

Besides their share of these funds, the Iowa branch claim their share of the \$147,393.32 appropriated by the act of April 10, 1869, in payment for lands ceded under the treaty of 1867.

The basis for the foregoing claims of the Iowa branch of the Sacs and Foxes grew out of the removal of the tribe from Iowa to Kansas, under the provisions of the treaty of 1842.

By article 1 of that treaty the tribe ceded to the United States all their "lands west of the Mississippi River to which they have any claim or title, or in which they have any interest, whatever," reserving the right to occupy for the term of three years from the time of signing the treaty a certain described portion of the lands ceded, the Government agreeing to assign a tract suitable and convenient, as soon after the ratification of the treaty as convenient, for a permanent and perpetual residence for them and their descendants, "which tract of land shall be upon the Missouri River or some of its waters."

The removal provided for in the aforesaid treaty was effected within the time prescribed therein, Governor John Chambers, of Iowa, ex officio superintendent of Indian affairs of the Iowa superintendency, under date of September 28, 1845, saying:

The time stipulated by the treaty of October, 1842, with the Sacs and Foxes for their removal from the lands ceded by them to the United States will expire on the 11th of next month, and already a part of the Sacs, led by their energetic and talented chief, Keokuk, are on their way to the lands west of the Missouri. (Report of the Commissioner of Indian Affairs for 1845, p. 481.)

In a report to the Commissioner of Indian Affairs, dated September 1, 1846, United States Indian Agent John Beach, in charge of the Sac and Fox Agency, says:

With the exception of about 100, in which number were many sick and infirm, the Sacs and Foxes passed out of their former country within the period prescribed by treaty. They, however, did not all continue their emigrating march with equal perseverance. Different influences—some extraneous and improper, others originating with themselves, and less avoidable—created delays. * * * By the commencement of the current year the entire tribe of Sacs, with about one-fifth of the Foxes, had concentrated upon the Kansas River, there awaiting the arrival of the remainder. * * *

The band of Foxes which is yet behind, in passing through the country of the Pottawatomies, was induced to make a halt there. I am told that they were invited to stop by the chiefs of that people. * * * But it is presumed that the entire people will congregate here by the period for the annuity payment of the present year. (Report of the Commissioner of Indian Affairs for 1846, pp. 298, 299.)

Excepting a few sick and infirm members of the tribe, and perhaps some who, from choice or other causes, loitered on the way, as in the case of those referred to by Agent Beach, it must be assumed that the whole tribe had reached and were located upon their new lands within a reasonable period after the aforesaid report of Agent Beach.

As confirmatory of this, the same agent, in a report to the Commissioner of Indian Affairs, dated September 1, 1847, says that "within the past twelve months the Sacs and Foxes have become settled upon the tract of land assigned them under the treaty of 1842." (Report of Commissioner of Indian Affairs for 1847, p. 845.)

In their memorial to Congress (Senate Mis. Doc., No. 48, Fifty-third Congress, third session, p. 1) the claimants say:

That the tribe of Sac and Fox Indians of the Mississippi formerly resided upon land now within the State of Iowa; that by the treaty of 1842 "all the lands west of the Mississippi River to which they have any claim or title, or in which they have any interest whatever," were ceded to the United States, they receiving, as part consideration for said cession, a reservation in what is now the State of Kansas, to which they removed.

The locality of the said new reservation in Kansas proving to be not so healthful, and becoming for this and the other reasons dissatisfied with the change, a portion of the tribe returned to the State of Iowa prior to the year 1855.

In his report of September 1, 1845, made from the agency in Iowa, Capt. John Beach, Indian agent, says in relation to the location in Iowa:

I will conclude by observing that we were unfortunate in the choice of the present location. I doubt if there can be a more unhealthy point within the Territory of Iowa than the site of this agency and vicinity. In common with nearly all the residents, civil and military, of the place, I, with my family, have suffered severely from diseases of a malarious origin during the past and present summer. Since September 1, 1844, seventy-nine Indians have died. (Report of the Commissioner of Indian Affairs for 1845, p. 483.)

In his report of a year later, made from the new agency in Kansas, the same officer says:

The climate appears pleasant. We have heard no other than a very sickly character ascribed to it; but thus far, at least, notwithstanding a long duration of excessive heat, our exposed situation, and unacclimated habits, our apprehensions have proved entirely unfounded. (Report of the Commissioner of Indian Affairs for 1846, pp. 298, 299.)

The records of the Indian Office show that a part of the memorialists returned to Iowa about the year 1855 (Indian Office files, Sac and Fox, G. 5, 1863), after having remained with the tribe in Kansas for a period of about ten years.

At the date of the treaty of 1842 the tribe resided in Iowa, but by that treaty their lands in that Territory were ceded to the United States, and other lands in lieu thereof were accepted in what is now the State of Kansas. The tribe was moved to their new reservation, in conformity with the terms of the treaty, but in the winter of 1854 and 1855 a portion of the tribe, constituting the pioneers of this small band, other small parties following in each of the years from 1862 to 1866, inclusive, returned to Iowa, and thereafter purchased lands upon which they now reside and where they are known as the Sacs and Foxes of Iowa. Their abandonment of the reservation provided

for them in Kansas and taking up their residence in Iowa was without the consent of the United States.

In their first claim they ask for annuities from 1853 to 1867.

The evidence presented by the memorialists and the record show that no part of this band reached Iowa on their return until about the winter of 1854 and 1855.

The record shows further that the pioneers of the band received their last annuities with the reservation Indians at the agency in Kansas in the latter part of 1854.

150 These were not upon the reservation after that date. They had abandoned it, and, so far as the record or evidence shows, never claimed, during the years named, any annuities that were paid out to the Sacs and Foxes upon the said reservation.

Article 7 of the treaty of October 1, 1859, provided as follows, viz:

The Sacs and Foxes of the Mississippi, parties to this agreement, are anxious that all the members of their tribe shall participate in the advantages herein provided for respecting their improvement and civilization, and to that end to induce all that are now separated to rejoin and reunite with them. It is therefore agreed that, as soon as practicable, the Commissioner of Indian Affairs shall cause the necessary proceedings to be adopted to have them notified of this agreement and its advantages, and to induce them to come in and unite with their brothers; and to enable them to do so, and to sustain themselves for a reasonable time thereafter, such assistance shall be provided for them at the expense of the tribe as may be actually necessary for that purpose: *Provided, however,* That those who do not rejoin and permanently reunite themselves with the tribe within one year from the date of the ratification of this treaty shall not be entitled to the benefit of any of its stipulations. (15 Stat. L., p. 469.)

Those who left the reservation in 1862 and later years were upon the reservation at the date of and were parties to the treaty of 1859, and were not less bound by its terms than were those who left the reservation in 1854, who were also excluded from the benefits of that treaty in failing to return to the reservation "within one year from the date of ratification of this treaty," July 9, 1860.

It is doubtless a fact also that these later migrants, as did the pioneers of this band, received their annuities and all other treaty benefits up to the dates of their departure from the reservation.

In their second claim they ask for their share of the annuities from 1867 to 1894, including the \$5,000 set apart for support of a manual labor school, \$5,000 set apart for support of national tribal government, and \$1,500 set apart for pay of a physician and for purchase of medicines.

By act of Congress approved March 2, 1867, it was provided—

That the band of Sacs and Foxes of the Mississippi, now in Tamar (Tama) County, Iowa, shall be paid pro rata according to their numbers, of the annuities, so long as they are peaceful and have the assent of the government of Iowa to reside in that State. (14 Stat. L., p. 507.)

A treaty made between the United States and the Sac and Fox

Indians, February 18, 1867, ratified October 14, 1868, for the removal of the Indians from the reservation in Kansas to a reservation in the Indian Territory, recognized the rights of the Sacs and Foxes of Iowa to share in the tribal annuities. (15 Stat. L., p. 495.)

The first payment to the Iowa branch was made early in the year 1867, the proportion of said annuities paid to them being \$11,174.66, payments to them at that rate being continued up to and including the fiscal year 1884.

In 1884 Congress provided—

That hereafter the Sacs and Foxes of Iowa shall have apportioned to them, from appropriations for fulfilling the stipulations of said treaties, their per capita proportion of the amount appropriated in this act, subject to provisions of treaties with said tribes; but this shall apply only to the Sacs and Foxes now in Iowa: *And provided further*, That this shall apply only to original Sacs and Foxes now in Iowa, to be ascertained by the Secretary of the Interior. (Act of July 4, 1884, 23 Stat. L., p. 85.)

Pursuant to this requirement of Congress, a census was taken, and it was ascertained that there were at that time 317 original Sac and Fox Indians residing in Iowa. From that date, including the fiscal year 1885, these Indians have been paid upon the basis of the number stated, the payment amounting to about \$15,220 annually, except in two years, when they were paid a larger sum.

151 In their memorial these Indians complain that from 1867 to 1894 they were not paid the per capita amount which they were entitled to receive under the act of Congress of March 2, 1867 (before named), and under the treaty of 1867.

By an act of May 17, 1882, Congress provided—

That hereafter the Sacs and Foxes of Iowa shall have apportioned to them from appropriations for fulfilling the stipulations of said treaties no greater sum thereof than that heretofore set apart for them. (22 Stat. L., p. 78.)

Thus it will be seen that from 1882 to 1885 there could not be paid to the Iowa Sacs and Foxes any greater sum annually than they had received annually prior to that time. It seems also that this act of Congress is legislative approval as to the manner in which the fund had been distributed prior to its date.

The memorialists also set up the claim that the \$10,000 which the treaty of 1867 provides shall be set apart for the maintaining of a manual labor school and for the support of tribal government should not affect their shares of the annuities. That is to say, that the aggregate annuities, to-wit, \$51,000, should be divided pro rata among the Sacs and Foxes of Iowa, as well as the Sacs and Foxes of Oklahoma, without any deduction on account of maintaining schools and the tribal government of the last-named branch.

An exception has been noted in the amount of the annual payments since the census taken under the act of 1884.

This exception was in the fiscal years 1885 and 1886, in each of which the sum of \$19,020 was apportioned and paid to them—this sum being based upon the amount of the aggregate annuities, \$51,000.

Subsequent to these payments, the Oklahoma Sacs and Foxes protested against the method of calculation adopted by the Indian Office, claiming that the \$10,000 set apart by the ninth article of the treaty of 1867 for manual labor school and for support of tribal government should be deducted before a division of the annuities between the two branches.

Upon appeal to the Department this protest was sustained by Secretary Lamar, in a letter addressed to the Commissioner of Indian Affairs, on June 1, 1886, as follows, viz:

Referring to your letter of March 27, 1886, relative to the distribution of the treaty funds of the Sac and Fox tribe of Indians of the Mississippi, and to the indorsement of this Department of April 5, 1886, thereon, inclosing for your information an opinion on the subject by the Assistant Attorney-General for this Department, holding that "the office of Indian Affairs would not be required to deduct the sum of \$11,500, nor any part of said sum, from the total amount appropriated for said Indians before a calculation is made for the distribution of said money per capita among the Indians located in the State of Iowa and the Indian Territory," Moses Keokuk, chief of the Sac and Fox tribe of Indians of the Mississippi in the Indian Territory, on April 26 filed in this Department an appeal from the foregoing conclusion on the case, and urged that the sum of \$5,000 for support of schools, and the further sum of \$5,000 for support of their national government, required by their treaty to be set apart annually from the income of their funds for the purposes named, together with the sum of \$1,500 for medicines and pay of physician required by the acts of appropriation to be used for that purpose from the income of the fund, making in all a total of \$11,500, should be deducted from the total amount of their income \$51,000, before the per capita distribution is made.

I have given the matter further consideration and have looked more carefully into the provisions of the treaty with these Indians of February 18, 1868 (15 Stat. L., 495), on the subject. In the 9th article of that treaty it is provided that "in order to promote the civilization of the tribe one section of land convenient to the residence of the agent shall * * * be set apart for a manual-labor school; and there shall also be set apart, *from the money to be paid to the tribe under this treaty*, the sum of \$10,000 for the erection of the necessary school buildings and dwelling for teacher, and the annual amount of \$5,000 *shall be set apart from the income of their funds* * * * for the support of the school; and after 152 the settlement of the tribe upon their new reservation the sum of \$5,000 of the income of their funds may be annually used under the direction of the chiefs, in the support of their national government. * * *"

Article 21 of said treaty provides that "* * * no part of the funds arising from or due the nation under this or previous treaty stipulations shall be paid to any bands or parts of bands who do not permanently reside on the reservation set apart to them by the Government in the Indian Territory, as provided in this treaty, *except those residing in the State of Iowa; * * **"

The Sac and Fox Indians of the Mississippi, one of the parties to this treaty, include at present the three classes, viz: (1) Those now living on the reservation. (2) Those living in Kansas. (3) Those living in the State of Iowa. The treaty was made with the tribe, and all of the several bands or classes composing the tribe are bound by its provisions. As shown above, it is provided in that treaty that the sums specified should be *set apart from the money to be paid to the tribe under the treaty*.

The object of both parties to the treaty was to *promote the civilization of the tribe* and hence it was agreed that from the common fund should be paid the sums of money agreed on for the accomplishment of that object.

At the date of the treaty none of those Indians were on the reservation provided for by that treaty. It was not stipulated that said sums should be set apart from the pro rata share of those who might move on the reservation, but that it should be *set apart* from the money to be paid to the *tribe* under the treaty. If, therefore, that sum of money is \$51,000, and it is stipulated that from such income a specific sum should be set apart for purposes common to all who might elect to accept its benefits it is clear that the sum remaining for *pro rata* distribution would be the difference between \$51,000 and the specific charge agreed to be deducted therefrom.

The twenty-first article of said treaty does not militate against this view, but confirms it. It was desired that all the tribe should participate in all the advantages to be derived from the investment of their funds, sale of lands, etc., by joining their brethren on the reservation. In aid of this it was provided that no part of the fund should be paid to any band or parts of bands who do not reside on the reservation, *except those residing in the State of Iowa*.

To what extent, then, are the Sacs and Foxes living in the State of Iowa excepted from the obligation of the treaty? Simply this: Their right to remain in Iowa is recognized, without forfeiting their right to share in the common fund. No bands or parts of bands who do not reside on the reservation shall be paid any part of said fund, except those living in the State of Iowa. This is the sole exception in their favor; but they are equally bound by the treaty stipulation, providing that from the common fund shall be deducted the amounts specified for the support of the school and the National Government. If it was not intended that the sum so provided to be set apart annually from the income of their funds should be deducted from the common fund before distribution, why not have said that there shall be apportioned among the Sacs and Foxes of the Mississippi their proportion of the amount appropriated by this act, and from the amount so apportioned and due to the Sacs and Foxes living on the reservation there shall be set apart the sum of \$5,000 for the support of the school and \$5,000 for the support of the Government? But if there is any question as to the construction of this treaty in reference to the proper disposition of this fund, the act of 1885 (23 Stat. L., 373) making appropriation for the Sacs and Foxes of the Mississippi removes all doubt. That act appropriates \$51,000 for the said Indians, and provides that the sum of \$1,500

shall be used for pay of a physician and medicine for the use of said Indians. It also provides that "hereafter the Sacs and Foxes of Iowa shall have apportioned to them, from appropriations for fulfilling the stipulation of said treaties, their per capita proportion of the amount appropriated in this act, subject to provision of treaties with said tribes; * * * that this shall apply only to the (original) Sacs and Foxes now in Iowa * * *."

What are the provisions of the treaty to which their apportionment is subject? Clearly, the specific charge of \$10,000 which by the treaty was provided to be *set apart from the income of their funds*. A careful examination of the treaty fails to show that the income to be paid annually to these Indians is subject to any other provision. I think it therefore plain that the sum of \$10,000 should be deducted from the \$51,000 appropriated before the per capita distribution is made to the several bands.

In reference to the sum of \$1,500, appropriated for the pay of a physician and medicine for said Indians, article 10 of said treaty provides that "The United States agree to pay annually, for five years, * * *" the sum of \$1,500 for said purpose.

This limit of five years has long since expired, and therefore the treaty obligation of the Government to the Indians for that purpose has ceased; but as the necessity for a physician and for medicine for the Indians still exists, Congress has deemed it proper to require that these necessities shall be provided for out of the income of the tribe. The provision of the law of May 15, 1886, on this subject is as follows:

"For interest on eight hundred thousand dollars, at five
153 per centum, per second article of treaty of October eleventh,
eighteen hundred and forty-two, forty thousand dollars: *Pro-*
vided, That the sum of one thousand five hundred dollars of this
amount shall be used for the pay of a physician and for purchase
of medicine; * * *"

From what "amount" is this sum to be taken? The law says from "this amount"—"forty thousand dollars." It is therefore clearly made a charge against that sum, and it should be deducted therefrom before any per capita distribution of the fund is made to the Indians of the several bands of the tribe.

You will be governed by this letter in your action regarding the several matters herein considered.

This matter was properly disposed of by Secretary Lamar. (Opinion of Assistant Attorney-General Hall, Int. Dept., Dec. 23, 1895.)

The memorialists also claim that the \$1,500 which Congress has provided annually since 1875, with one or two exceptions, *should be set apart for the payment of a physician and the purchase of medicine should not be deducted from the annuities before the division of the pro rata shares of the Iowa branch, but that said amount should be charged to the Oklahoma branch.*

In the first act of Congress in which provision was made for this purpose the following language is used:

of which sum one thousand five hundred dollars shall be paid for a physician for the agency, who shall furnish the necessary medicines. (Act June 22, 1874, 18 Stat. L., p. 163.)

Congress in express terms directed that "of this sum," meaning the \$51,000 appropriated, \$1,500 should be paid for a physician for the agency, who should furnish the necessary medicines.

It is very evident that said amount was to be taken from the gross sum appropriated, and that the appropriation was for the benefit of the Sacs and Foxes on the reservation set apart for that tribe under the treaty of 1867.

In some of the subsequent acts making annual appropriations for this purpose the language of the original appropriation is changed, but there is not such a change of language as would indicate a change of intent on the part of Congress. (Opinion of Assistant Attorney-General Hall, Int. Dept., Dec. 23, 1895.)

The annual deductions since the fiscal year 1884 on account of physician and medicine have ranged from \$1,260 down to \$1,100, averaging about \$1,150 instead of \$1,500, as charged by the memorialists, and they have participated in their proportion of the difference since the date named above.

The further claim is made that the Sacs and Foxes of Oklahoma have become citizens of the United States and of the Territory of Oklahoma; that the tribal organization can no longer exist, and that they should not have reserved for them the \$5,000 for the support of a tribal government.

Notwithstanding these Indians are citizens of the Territory of Oklahoma and of the United States, yet they have been treated by Congress as a tribe for the purpose of carrying out the treaty stipulations with them. This Congress may do. (3 Wallace, p. 419; Opinion of Assistant Attorney-General Hall, Int. Dept., Dec. 23, 1895.)

Their third claim is for their shares of \$147,393.32, appropriated by Congress to pay for land ceded by the treaty of 1867; \$50,302.84 is claimed on this account, with interest thereon at 5 per cent from 1873, amounting to \$57,848.27.

By the third article of the treaty of February 18, 1867 (15 Stat. L., p. 495), the United States agreed to pay the Sacs and Foxes, at the rate of \$1 an acre for about 157,000 acres of land ceded by the first and second articles of that treaty, these lands being the 154 unsold portion of their diminished reserve in Kansas, defined in the first article of their treaty of October 1, 1859, and of the unsold portion of their old reservation, provided by article 4 of the same treaty.

The lands thus ceded were subsequently ascertained to have an area of 147,393.32 acres, and Congress, by an act approved April 10, 1869 (16 Stat. L., p. 35), appropriated \$147,393.32, being the sum necessary to pay therefor at the rate of \$1 per acre.

After the payment of certain indebtedness of the tribe, provided for in the third article of the treaty of 1867, the balance remaining of the above-named fund was invested in 1873, under the provisions of the same article, in United States 5 and 6 per cent bonds, which, on maturity, were converted into United States 4 and 5 per cent bonds. These last-named bonds were subsequently disposed of, and the proceeds thereof, amounting to \$55,058.21, deposited in the

Treasury to the credit of the tribe, under the provisions of the act approved April 1, 1880 (21 Stat. L., p. 70), and interest at the rate of 5 per cent per annum is paid thereon.

Interest amounting to \$61,129.62 has been collected on the aforesaid bonds and on the invested fund, an average of about 5 per cent per annum, and \$1,305.46 premium was realized from the sale of coin interest and \$3,839.50 premium from the sale of the 4 and 5 per cent bonds referred to, the whole received thereon aggregating \$66,274.58 (Senate Mis. Doc. No. 48, Fifty-third Congress, third session, pp. 21-25), from the date of the original investment to July 1, 1895.

Of the aforesaid interest income, \$11,523.18 has been placed in the hands of the agent for the Iowa Sacs and Foxes since 1886 for payment to them, and the same has been so paid, excepting the shares of six individuals, which have been returned to the Treasury and now remain to their credit on the books of that Department.

The twenty-first article of the treaty (1867) provides:

The Sacs and Foxes of the Mississippi, parties to this agreement, being anxious that all the members of their tribe shall participate in the advantages to be derived from the investment of their national funds, sales of lands, and so forth, it is therefore agreed that * * * no part of the funds arising from or due the nation under this or previous treaty stipulations shall be paid to any bands or parts of bands who do not permanently reside on the reservation set apart to them by the Government in the Indian Territory, as provided in this treaty, except those residing in the State of Iowa; * * *

Under this article of the treaty the Iowa Sacs and Foxes are entitled to their just proportionate shares of the residue of the aforesaid fund appropriated to pay for the lands ceded by the first and second articles of the treaty.

The said third article of the treaty also made provision for the payment of—

the outstanding indebtedness of the said tribe, now represented by scrip issued under the provisions of previous treaties, and amounting, on the first of November, eighteen hundred and sixty-five, to twenty-six thousand five hundred and seventy-four dollars, besides the interest thereon, out of the proceeds of the sale of lands ceded in this treaty, and the amount herein provided to be paid to said Indians, after deducting such sums as under the provisions of this treaty are to be expended for their removal, subsistence, and establishing them in their new country, shall be added to their invested funds, and five per cent interest paid thereon, in the same manner as the interest of their present funds is now paid.

This provision of the treaty required the payment of certain indebtedness represented by scrip issued under the provisions of former treaties. The Iowa Sacs and Foxes were parties to former treaties, and as a part of this migratory band remained on the reservation with the tribe as late as the year 1866—small parties of them separating from the main body in each of the years from 1862 to 1866, inclusive—and there being no record or evi-

dence by which this indebtedness can be accurately apportioned among individuals or the several sections of the tribe, it is held that this branch is liable for its pro rata share thereof; but it is also held that they are not liable for any of the expenses of the removal of the tribe to and locating them on the new reservation in the Indian Territory, none of them having been so removed.

An examination of the records of the Indian Office and the Treasury Department shows that \$38,034.49 (Report of the Commissioner of Indian Affairs for 1871, p. 680) was paid on account of the aforesaid outstanding indebtedness out of the said sum of \$147,393.32 received for lands ceded under the treaty of 1867, leaving a balance of \$109,358.83, subject to distribution between the two branches of the tribe.

At the time of the appropriation of the aforesaid \$147,393.32 the Sacs and Foxes of Iowa numbered about 265 souls, and these in Oklahoma and Kansas about 728, the two branches aggregating 993 persons.

Therefore the Iowa branch is entitled to 265/993 of the \$109,358.83 residue of the fund received in payment for lands sold under the first and second articles of the treaty of 1867, amounting to \$29,184.38, and interest thereon from July 1, 1873, to January 1, 1896, at the rate of 5 per cent per annum, being \$1,459.22 per year for twenty-two and one-half years, equal to \$32,832.45.

The memorialists also make the following statements in the aforesaid Senate document, viz:

(1) In 1869, the year the appropriation was made for the lands ceded by the treaty of 1867, the numbers of the two divisions of the tribe were as follows: Those removed to Oklahoma, 728; those in Iowa, 265. On the basis of these numbers those in Iowa are entitled to 265/993 of said appropriation, \$147,393.32, which amounts to the sum of \$39,334.57. But instead of receiving this sum they got no portion of said appropriation made in payment for the cession of the tribal lands in the State of Kansas.

This is disposed of in the finding on claim No. 3.

It will be observed that in their claim No. 3, which is for the same objects as the above, they claim \$50,302.84, principal, instead of \$39,334.57, as above, and interest amounting to \$57,848.27.

(2) They claim that instead of the balance of \$55,058.21 of the appropriation of \$147,393.32, made for the payment for the land ceded by the treaty of 1867, being placed in the Treasury to the credit of the tribe, they, the Iowa branch, should have received, in proportion to their numbers, as much of said payment as was devoted to the exclusive use and benefit of the Oklahoma branch, and that the remainder should have been placed in the Treasury or invested for the tribe, all the members of the tribe sharing in the income therefrom.

This is also disposed of by the finding in claim No. 3.

(3) By the treaty of 1842 a reservation for the tribe was given as part consideration for the cession of tribal lands in the State of Iowa. Another item of consideration for that cession was the payment by the United States of debts of the tribe to the amount of \$258,566.34. (Art. 2, 7 Stat. L., 596.)

The Kansas reservation was diminished by the treaty of 1859 (14 Stat. L., 469), and the proceeds were used exclusively for the benefit of those members of the tribe residing then in Kansas. The treaty provided that said proceeds should be expended in building houses furnishing agricultural implements, stock animals, and other necessary aid for commencing agricultural pursuits upon the allotments of land to be taken on the diminished reservation. The said treaty also provided that the debts of the tribe and of the individuals thereof should be paid from said proceeds. It was stipulated that such debts should be first liquidated and their justness ascertained by an "examination thereof, to be made by their agent and the superintendent of Indian affairs for the central superintendency, subject to revision and correction by the Secretary of the Interior."

* * * * *

The annual report of the Commissioner of Indian Affairs for 1852, commencing at page 549, contains a brief statement of the proceedings taken under the treaty of 1859, for the ascertainment of the indebtedness, expenditure of the funds, etc., from which the following is condensed, * * * making a total of \$271,822.49.

This amount constituted an indebtedness for which there were no funds on hand properly chargeable with its payment, the ceded lands not yet having been sold. To provide for this indebtedness certificates of indebtedness were issued for the whole sum. These certificates bore interest.

Sales of a portion of the lands were subsequently made under said treaty, viz, 268,502.68 acres for \$282,439.27. * * *

The amount of the principal of the interest-bearing certificates outstanding at the date (November 1, 1865) of the statement from which the foregoing figures are taken was \$26,574.59.

Thus the matter stood up to the date of the treaty of 1867, and these facts and figures show that those members of the tribe residing on the reservation in Kansas had not only received all the benefits arising from the sale of a large portion of the tribal lands and allotments of land on the diminished reservation, but were still in debt to the amount of \$26,574.59, with interest accumulated and accumulating thereon.

The seventh article of the treaty of 1859, which contained a provision regarding absent members of the tribe, provided—

That those who do not rejoin and permanently reunite themselves with the tribe within one year from the date of the ratification of this treaty shall not be entitled to the benefit of any of its stipulations.

It has been shown that a part of the Iowa Sacs and Foxes separated themselves from the tribe on the reservation in 1854 or 1855, and that others of them left the reservation in each of the years from 1862 to 1866, inclusive, none of them, so far as can be discovered, ever returning, as required by the aforesaid article 7 of the treaty of 1859.

It was not the policy or the custom of the Government during these years to countenance or permit absenteeism from reservations,

or to pay annuities to Indians except at their agencies on their reservations.

Those who left the reservation prior to the date of the treaty and failed to return forfeited and rights they might have acquired under the provisions of article 7 had they returned.

As to those who left subsequent to the date of the treaty, there is nothing of record, nor is there any evidence to show that these were not of that class of "individual members" whose debts, "due and owing at the date of the signing and execution hereof," it was agreed by the fifth article of the treaty "shall be liquidated and paid out of the fund arising from the sale of their surplus lands." By their continued absence, without the consent of the Government, these also forfeited any rights that may have been attached to them as members of the tribe.

There is nothing found due under the provisions of the treaty of 1859.

(4) The interest on the unexpended \$55,058.21 of the ceded land appropriation has been 5 per cent upon the greater portion, with premium on the gold, and 6 per cent on the remainder, while the same was invested in United States bonds, and 5 per cent since it was placed in the Treasury.

The investment of the unexpended balance above referred to was made in 1873 in \$54,200 United States 10-40 5 per cent bonds, and \$905.41 United States loan of 1865, 6 per cent bonds, at an aggregate cost of \$61,855.73. The \$905.41 United States 6 percents were redeemed in 1878, and the proceeds, \$905.41, invested in \$858.21 United States funded loan (1881) 5 per cent bonds, and the \$54,200 United States ten-forties were redeemed in 1879 at par, the proceeds being invested in \$54,200 United States consols of 1907, 4 157 percents, thus making the cost of the \$55,058.21 in stocks \$61,855.73, and showing \$6,797.52 as the cost of the several investments.

The bonds were disposed of in 1881, realizing a premium of \$3,839.50 on the sale, and the principal, \$55,058.21, was placed in the Treasury to the credit of the tribe, at 5 per cent interest, under the provisions of the act of April 1, 1880.

For several years after the original investment in 1873 gold was at a premium, and the interest being payable in that coin, the same was converted into currency as collected and the premium as well as the interest passed to the credit of the tribe. The amount of premium thus realized was \$1,305.46. This, with the premium realized on the sale of the 4 and 5 per cent bonds, \$3,839.50, as stated, makes an aggregate of \$5,144.96 profits from this source. Deducting this sum from the \$6,797.52 shown as the cost of the several investments, leaves \$1,652.56 as the net cost of these transactions.

Interest to the amount of \$61,129.62 has been collected on the aforesaid investments up to July 1, 1895, being a fraction over 5 per cent for the whole time, the excess over that rate for the entire period being \$365.54. Taking this amount from the net cost of the investments, as shown above, leaves the net income \$1,187.02 less than

would have accrued in the same period on the investment of an equal sum at 5 per cent.

This also has been disposed of by the finding in claim No. 3.

It is believed that the foregoing covers all the matters presented by the memorialists.

Finding.

First Claim.—Nothing is found due on this claim for annuities from 1853 to 1867, it being held that the same were forfeited in consequence of the Indians abandoning their reservation in defiance of treaty obligations and without the consent of the United States Government.

Second Claim.—Nothing is found due on this claim for annuities charged to have been unjustly apportioned from 1867 to 1894. It is held that the same had been properly and justly apportioned and paid in accordance with the provisions of the several treaties and acts of Congress.

Third Claim.—On this claim for their proportionate shares of \$147,393.32, appropriated by the act of April 10, 1869, in payment for lands ceded by the first and second articles of the treaty of February 18, 1867, there is found due them the sum of \$29,184.38 on account of principal, and \$32,832.45 interest thereon, at the rate of 5 per cent per annum from July 1, 1873, to December 31, 1895, inclusive, aggregating \$62,016.83.

The reasons for this finding will be found in the Statement of the "third claim," beginning on page 9 of this account.

As has been shown, \$11,523.18 has been paid to the memorialists from the interest account of the tribal invested fund since 1886. The finding of their "third claim" makes an allowance for interest on the amount of the principal due for the whole time of the investment, from 1873. The above sum is therefore to be deducted from the amount found due them on the "third claim."

It has also been shown that \$19,020 were paid them in each of the fiscal years 1885 and 1886 on account of their share of the tribal annuities. This was \$7,600.40 in excess of their proper proportion under the decision of the Secretary of the Interior of June 1, 1886. This sum is also to be deducted from the finding on the "third claim."

158 The account, therefore, will stand thus:

Amount of principal found due on "third claim".....	\$29,184.38
Amount of interest found due on same claim.....	32,832.45

Making a total of.....	62,016.83
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Deduct as follows:

On account of interest paid.....	\$11,523.18
On account of overpayments of annuities, fiscal years 1885 and 1886.....	7,600.40
	<hr/> 19,123.58

Leaving a balance due of.....	42,893.25
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WASHINGTON, D. C., *February 6, 1896.*

SIR: We beg to acknowledge receipt of your letter of the 30th of January, 1896, inclosing to us, as attorneys for that branch of the Sac and Fox Indians of the Mississippi residing in the State of Iowa, "a copy of an account prepared in the Department, in conformity with the provisions of the act of March 2, 1895, of their claims for their shares of the tribal annuities under the several treaties with the tribes."

We are also informed in the same letter that—

Notice of this accounting has been given to the Oklahoma branch of the tribe, and they have been requested to file their objections thereto, if any, within a reasonable time.

We have examined and considered the said "statement of account," and we respectfully submit, on behalf of our clients, that error has been committed therein as follows:

The account sets forth:

First Claim.—Nothing is found due on this claim for annuities from 1853 to 1867, it being held that the same were forfeited in consequence of the Indians abandoning their reservation in defiance of treaty obligations and without the consent of the United States Government.

The statement of facts alleged and provisions of treaties upon which this adverse conclusion is stated may be briefly summarized as follows: That all of the tribe did remove to Kansas under treaty provisions; that after remaining in Kansas for about ten years, the pioneers of those who returned to Iowa reached that State in the winter of 1854-55, after having received their share of the annuities paid to the tribe in the latter part of 1854; that they were not upon the reservation in Kansas after that date, "and, so far as the record or evidence shows, never claimed during the years named any annuities that were paid out to the Sacs and Foxes upon said reservation." (See pp. 6 and 7 of the "Statement of account.")

Article 7 of the treaty of 1859 is also quoted (*ibid.*, p. 7) as showing that those of the tribe who returned to Iowa forfeited their annuities by abandoning the reservation "in defiance of treaty obligations."

It is true that those of the tribe who returned to the State of Iowa, whether they returned in 1853 or in 1854, did not go back to the agency in Kansas to claim their annuities; but it is not true in any sense that they made no claim to and for their annuities. The record shows to the contrary. On page 1 of their memorial to Congress (Senate Mis. Doc. No. 48) is set out an act of the legislature of the State of Iowa, showing that the Sacs and Foxes who had returned had made known to the State legislature their return, their condition, situation, their reasons for returning to their old home, their desire and request to be permitted to remain in said State, and also

159 their complaints against nonpayment of their annuities, and their request to the General Government for payment thereof through the State legislative act set forth.

It will be seen that the said act of the legislature of the State of Iowa was approved July 15, 1856; that it grants the petitioners permission to reside in said State; and, further, it contains this:

And that the governor be requested to inform the Secretary of War thereof, and urge on said Department the propriety of paying said Indians their proportion of the annuities due or to become due to said tribe of Sac and Fox Indians.

The governor of the State of Iowa was ex officio superintendent of Indian affairs over those Indians when they removed from the State; they, with their limited knowledge of affairs of civilized government, naturally supposed that he was the proper official to whom they should petition; all the tribal lands in that State had been ceded by the tribe; they received the sanction of the State and by implication that of the United States to remain in the State and the failure then on the part of the Indian Department to object to the proposed settlement of these Indians in Iowa was an approval thereof by implication.

Clearly the Indians had not thought of forfeiting their annuities nor of abandoning any of their rights thereto under their treaties, but on the other hand they made, through the highest authority of the State of their adopted residence a formal and respectful request for the payment of their "annuities due or to become due." The legislative act was full notice to the General Government.

The adverse conclusion formulated in the "Statement of account" on this item of the claims of the memorialists appears to be based upon an opinion prepared by the Assistant Attorney-General for the Department of the Interior, dated December 23, 1895, which is yet pending before the Secretary of the Interior, wherein it is stated:

I have been informed, upon inquiry at the Indian division, that during said years it was policy and the practice of the Government to pay no annuities to Indians who absented themselves from reservations without authority during the time of their absences, unless there was some provision of statute, or treaty, or agreement with the tribe of Indians that would authorize or require payment to such absent Indians. In this case I have been unable to find any requirement for the payment to the Sac and Fox Indians of Iowa from 1855 up to and including 1866.

In the same opinion it is claimed that the policy of nonpayment of annuities to Indians who have absented themselves from the reservation without authority is indorsed by the terms of the treaty (article 7) of 1859 with the Sacs and Foxes of the Mississippi.

Both these propositions are erroneous, and they may be considered together.

The provisions of article 7 of the treaty of 1859 should not be extended beyond the limits to which they are specifically confined by the terms thereof. The whole article is set out on page 7 of the "Statement of account." It sets forth the advantages of the treaty of which it forms a part; states that a portion of the tribe was then absent from the reservation; that it was desired that the absent portion of the tribe be invited to return to and remain with the tribe, and closes with this clause:

Provided, however, That those who do not rejoin and permanently reunite themselves with the tribe within one year from the date of the ratification of this treaty shall not be entitled to any of the benefits of its stipulations.

No annuities for the tribe were created by that treaty. No claim is based upon that treaty, near or remote, and it has no bearing upon the annuities of the tribe. It relates to land only. All that is said in their memorial by claimants as to the money accruing to the tribe under the treaty of 1859 is so much of the history of the treaty as to bring the financial transactions up to the treaty of 1867, and to show that when the latter treaty was made there remained of the tribal indebtedness created under the treaty of 1859 an unpaid balance of \$26,574.59 (see Senate Mis. Doc. No. 48, Fifty-third Congress, third session, pp. 6 and 7), of which the Iowa Sac and Fox Indians claim nothing.

It is shown in the "Statement of account" that the annuities of the tribe arise under treaties of 1804, 1837, and 1842 (see p. 3), in which there are no such provisions as those of article 7 in the treaty of 1859. It has been shown that the forfeiture stipulated for in article 7 of the treaty of 1859 is strictly confined to the benefits of its stipulations; that is, the benefits of the treaty of 1859, and of that alone.

It will be seen by article 21 of the treaty of 1867 that by that treaty a broader forfeiture of treaty benefits was proposed for the absent members of the tribe. It is in these words:

No part of the funds arising from or due the nation under this or previous treaty stipulations shall be paid to any bands or parts of bands who do not permanently reside on the reservation set apart to them by the Government in Indian Territory, as provided in this treaty, except those residing in the State of Iowa. (15 Stat. L., 504.)

The Sacs and Foxes then in Iowa are thus expressly excepted from the forfeiture of any benefits under that treaty or under previous treaties. It is contended that not only by the ratification of the treaty of 1859 the United States did not intend to sanction any treaty provision that would operate a forfeiture of any benefits accruing to the Indians in Iowa, other than the benefits accruing under that treaty, but that no existing rights were forfeited, and the words of the treaty of 1859 strictly confine forfeitures to the benefits accruing under that treaty. To that extent only was punitive legislation carried by Congress.

Laws regulating the payment of annuities to Indians are as follows:

The act of June 30, 1834, entitled "An act to provide for the organization of the Department of Indian Affairs," provides:

SEC. 11. *And be it further enacted*, That the payment of all annuities or other sums stipulated by treaties to be made to any Indian tribe shall be made to the chiefs of such tribe, or to such person as said tribe shall appoint; or if any tribe shall appropriate their annuities to the purpose of education, or to any other specific use, then to such person or persons as such tribe shall designate. (4 Stat. L., 737.)

The foregoing remained the law and regulation on the subject until the act of March 3, 1847, which provides:

SEC. 3. *And be it further enacted*, That the eleventh section of the "Act to provide for the better organization of the Department of

Indian Affairs," approved June thirtieth, eighteen hundred and thirty-four, be, and the same is hereby, so amended as to provide that all annuities or other moneys, and all goods, stipulated by treaty to be paid or furnished to any Indian tribe, shall, at the discretion of the President or the Secretary of War, instead of being paid over to the chiefs, or to such persons as they shall designate, be divided and paid over to the heads of families and other individuals entitled to participate therein, or, with the consent of the tribe, be applied to such purposes as will best promote the happiness and prosperity of the members thereof, under such regulations as shall be prescribed by the Secretary of War, not inconsistent with existing treaty stipulations. (9 Stat. L., 203.)

The next provision of law on the subject is found in the act of August 30, 1852, wherein the following is contained:

SEC. 3. *And be it further enacted*, That no part of the appropriations herein made or that may be hereafter made, for the benefit of any Indian or tribe, or part of a tribe of Indians, shall be paid to any attorney or agent of such Indian, or tribe, or part of a tribe; but shall in every case be paid directly to the Indian or Indians themselves to whom it shall be due, or to the tribe or part of
161 a tribe per capita, unless the imperious interest of the Indian or Indians, or some treaty stipulation, shall require the payment to be made otherwise, under the direction of the President.

Neither statutory inhibition nor treaty stipulation existed against the payment of annuities to these Indians. This was the law for the period from 1852 to 1876, and covers the period involved.

The next provision of law on the subject is found in the act of August 15, 1876, as follows:

SEC. 2. That no supplies or annuity goods, for which appropriation is made in this act, shall be issued to any band or tribe of Indians while the same may be engaged in hostilities against the United States or in depredations upon settlers; nor shall any sum of money appropriated by this act for any tribe of Indians for whom a reservation or territory shall have been made be paid to them or expended for their benefit unless such tribe and the warriors thereof shall remain peaceably within the territory assigned to them, unless absent by the consent of the agent. (19 Stat. L., 199.)

More than nine years prior to the enactment of the last quoted provision of law the Sacs and Foxes of the Mississippi in Iowa had received the sanction of Congress to remain in that State (see act of March 2, 1867, 14 Stat. L., 507; p. 2, Mis. Doc. 48, Fifty-third Congress, third session), and they had received the sanction of the State to reside there twenty years before, with notice to the United States.

The regulations of the Indian Department governing the payment of annuities to tribes are, as a rule, based upon the laws of Congress on the subject. No regulation has come under our notice in the examination of this matter that is in conflict with the law of August 30, 1852, and it is presumed that there are no such regulations in existence and that none so existed from 1853 to 1867.

The existing regulation of the Indian Office for the payment of annuities is as follows:

154. Annuity funds, except where otherwise clearly indicated

by treaty stipulations, must be divided and paid to the individual members of the tribe entitled to participate therein in equal shares per capita, heads of families receipting for the amount due them, their wives, and the minor members of their families. * * * (See Reg. Ind. Office, 1894.)

The foregoing is incorporated in the regulations of the Indian Office, approved by the present Secretary of the Interior, and they were the regulations governing the subject prior thereto, as will be found by reference to the regulations approved and adopted in 1884, and also those approved and adopted in 1880. We have no copies of the regulations prior to those dates available, but as that regulation is so clearly in accordance with the law of August 30, 1852, it is not probable that any regulations adopted and approved after its enactment were made inconsistent therewith.

A precedent for the adjustment of the tribal funds as claimed by the Sac and Fox Indians of the Mississippi residing in the State of Iowa will be found in the case of the Winnebago Indians.

By the treaty of 1859 the Winnebago tribe of Indians, then living in the States of Wisconsin and Minnesota, ceded a portion of their lands to the United States. The ceded lands were to be sold and the proceeds devoted to establishing the tribe on the diminished reservation and to paying the debts of the tribe.

That treaty contains as its Article V the exact words of Article VII of the treaty of the same year with the Sacs and Foxes of the Mississippi (*mutatis mutandis*), and which is as follows:

The Winnebagoes, parties to this agreement, are anxious that all the members of their tribe shall participate in the advantages herein provided for respecting their permanent settlement and their improvement and civilization, and to that end to induce all that
162 are now separated from to rejoin and unite with them. It is therefore agreed that as soon as practicable the Commissioner of Indian Affairs shall cause the necessary proceedings to be adopted to have them notified of this agreement and its advantages, and to induce them to come in and unite with their brethren; and to enable them to do so and so sustain themselves for a reasonable time thereafter, such assistance shall be provided for them, at the expense of the tribe, as may be actually necessary for those purposes: *Provided, however,* That those who do not rejoin and permanently reunite themselves with the tribe within one year from the date of the ratification of this agreement shall not be entitled to the benefit of any of its stipulations. (12 Stat. L., 1103).

A large number of the tribe, less than a majority, did not comply with the treaty by going to and living upon the diminished reservation. They petitioned for their proportion of tribal annuities and land funds, which was denied to them by the Indian Office for the reason that they had ceased to live with the tribe. This action of the Indian Office was approved by the Secretary of the Interior. For the correspondence see Annual Report of the Commissioner of Indian Affairs for 1863, page 339.

The claim of said Winnebagoes was brought to the attention of Congress, and that body, in the provision of the Indian appropriation act of June 25, 1864, appropriating the interest and other funds for the Winnebago tribe, enacted the following:

Provided, That the proportion of annuities to which the said stray bands of Pottawatomies and Winnebagoes would be entitled if they were settled upon their reservations with their respective tribes shall be retained in the Treasury to their credit, from year to year, to be paid to them when they shall unite with their said tribes, or to be used by the Secretary of the Interior in defraying the expenses of their removal, or in settling and subsisting them on any other reservation which may hereafter be provided for them (see 13 Stat. L., 172).

This equitable and righteous law was not fully complied with by the administrative branch of the Government. The Winnebago tribe ceded the remainder of their lands in Minnesota and were removed to a reservation in the then Territory of Nebraska. This was done under the act of February 21, 1863. Those of the tribe in Wisconsin had not rejoined the tribe, and did not accompany them to the new reservation in Nebraska. More than the proportionate share of the tribal fund was paid to and expended for those removed to Nebraska. The Wisconsin Winnebagoes again complained of the unjust distribution of the tribal annuities and funds, and Congress, by the act of January 18, 1881, directed that the annuities and appropriations under treaties be dispersed by the Secretary of the Interior pro rata; and further provided that a census be taken of both branches of the tribe and an account stated between them on the basis of said census of all the funds of the tribe from 1864 to the date of the act, January 18, 1881; and then provided that—

The balance found in favor of the Winnebagoes of Wisconsin, whatever the amount may be, shall hereafter be held and considered as a debt due to them from that portion of the tribe residing in Nebraska; and until said debt shall have been extinguished the Secretary of the Interior shall cause to be deducted annually from the proportion of the annuity moneys due to the Winnebago Indians in Nebraska, to be paid to the Winnebago Indians in Wisconsin, such proportion of the share of the annuities belonging to the said Winnebagoes of Nebraska as he may deem right and proper: *Provided, however*, That such sum shall not be less than seven thousand dollars per annum. (See act of January 18, 1881; 21 Stat. L., pp. 316, 317, especially section 4.)

This case of the Winnebagoes so closely resembles that of the Sacs and Foxes residing in Iowa that it is not necessary to follow up the history of the Pottawatomies, mentioned with them in the act of June 25, 1864. (13 Stat. L., 172.)

163 It is true that the Indian Office has at times made regulations seeking to deprive of their annuities Indians who leave their reservations and become citizens of the United States, unless otherwise provided by treaty or act of Congress. (See par. 161, Reg. of 1884, and par. 90, Reg. of 1880.) Congress was not long in correcting this injustice, as will be seen by the sixth section of the act of February 8, 1887, known as the "General allotment act" (24 Stat. L., 390). Indeed, the regulation was contrary to the express terms of the fifteenth section of the act of 1875, wherein it is provided, as to an Indian becoming a citizen, that he—

shall be entitled to his distributive share of all annuities, tribal

funds, lands, and other property, the same as though he had maintained his tribal relations. (8 Stat. L., 420.)

There are perhaps instances where the Indian Office has refused payment of annuities to Indians absent from their reservation, but in such cases there was some express treaty or legislative enactment applicable to the specific tribe warranting it, or the absent Indian was supposed to be dead. Such may have been done in other instances, but there is no law warranting such action. There may be some excuse for such action for punitive purposes or when the whereabouts of an absent Indian is not known to the Indian Office. But there is no excuse for violating law and treaty provisions in depriving any Indians of their annuities whose whereabouts are known.

In view of the clause of the act of 1867, hereinafter set out in full, providing that these Indians "shall be paid pro rata according to their numbers, of their annuities, so long as they are peaceful and have the assent of the government of Iowa to reside in that State," and as the State gave its assent in 1856, whereof the United States had notice, it is contended that the payment of annuities provided for should apply to the then past as well as to the date of the act. A large balance was found due the Wisconsin Winnebagoes under the law of 1881, and it was recouped from the portion of the tribal funds subsequently accruing to the Nebraska Winnebagoes, and was paid to and for the identical Wisconsin Winnebagoes entitled thereto, and this is precedent for action respecting the present claimants.

The Sac and Fox Indians in the State of Iowa are seeking from Congress redress for the same kind of wrongs that were suffered by the Winnebagoes of Wisconsin. The oldest and most intelligent of the band now residing in Iowa testify that the following numbers returned to that State: 144 in 1855, 77 in 1862, 42 in 1863, 13 in 1864, 12 in 1865, and 22 in 1866; making a "total, 310, which was the muster in 1867."

The first enrollment made of them by the United States after their return to Iowa was in 1867 or the year before, when only 265 were found and enrolled. It is presumed that the records of the Department contain information as to the enrollment of these Indians by the proper authorities of the State of Iowa, as was required by the act of the legislature of that State approved July 15, 1856, and that from the records and the evidence presented in the case a fair and reasonable average of the numbers of those residing in the State of Iowa from 1854-55 to 1866 may be ascertained, such an average as will do justice to those in Iowa, while doing no injustice to those now in Oklahoma, and that on such average of their numbers for those years a "Statement of the account" of what is due and payable to the memorialists on account of annuities withheld from them during those years can be made.

The testimony of the Indians as to the numbers returning to Iowa at different times has been filed since the presentation of their memorial to Congress. If we take those figures as a basis for the average, instead of the enrollment made in 1867, not taking any account of births or deaths, the average from 1855 to 1866 is found to be 205½. For the same period the average

of those now in Oklahoma is found, from the official statement of payments as reported by the Treasury (Mis. Doc. No. 48, pp. 17-19), to be 1,169.5. This would give the proper proportionate shares of the annuities as $205\frac{1}{2}/1375$ for those in Iowa, and $1169\frac{1}{2}/1375$ for those now in Oklahoma for the period from 1855 to 1866 inclusive. For this treaty period there was no charge upon the fund for school and national government; therefore the proportionate share to which claimants are entitled on this head on the basis of population named is \$91,466.18.

The "Statement of account" sets forth as to the second claim the following:

Second Claim.—Nothing is found due on this claim for annuities charged to have been unjustly appropriated from 1867 to 1894. It is held that the same has been properly and justly apportioned and paid in accordance with the provisions of the several treaties and acts of Congress.

The memorialists do not agree with the construction of the several provisions of the treaty and acts of Congress applicable to this portion of their claim. We do not deem it necessary to consume further time and space in setting forth their contention for their proportionate share of the two sums of \$5,000 each, annually devoted to the support of schools and the support of the national government of that portion of the tribe in Oklahoma, and taken for those purposes from the total amount of the annuities, before any pro rata distribution is made between the two portions of the tribe.

But as to the amount annually taken from the total sum of the annuities, before apportionment, and used wholly for the pay of a physician and for medicines for that portion of the tribe in Oklahoma, without any warrant in the treaty therefor, we feel that the finding is so manifestly unjust, and based upon such a strained construction of the provisions of the acts of Congress, that we are constrained to appeal to the Secretary of the Interior to give to it his most careful consideration.

The treaty of 1868 provided that the United States should for five years furnish a physician and medicines for the tribe. (15 Stat. L., 495, art. 10.) This provision soon expired. The need for the physician and medicines continued to exist. Congress provided therefor in the clause of the appropriation acts making appropriations for the annuities, aggregating \$51,000, in such language as the following:

of which sum, one thousand five hundred dollars shall be paid for a physician for the agency, who shall furnish the necessary medicines. (Act of June 22, 1874, 18 Stat. L., 163.)

In the act of August 15, 1876, the language was changed, and has thereafter continued as follows:

Provided, That the sum of one thousand five hundred dollars of this amount shall be used for the pay of a physician and for purchase of medicines. (19 Stat. L., 189.)

In the opinion upon which the statement of this item of account is based it is stated:

It is very evident that said amount was to be taken from the gross sum appropriated, and that the appropriation was for the benefit of the Sac and Fox on the reservation set apart for the tribe under the treaty of 1868.

Let us look further into this. On the subject of the payment of the annuities to the Sac and Fox Indians in Iowa, who from 165 1854 to 1866 had received not a penny of the tribal annuities, Congress enacted in 1867 the following:

That the band of Sacs and Foxes of the Mississippi, now in Tamar (Tama) county, Iowa, shall be paid pro rata according to their numbers, of the annuities, so long as they are peaceable and have the assent of the government of Iowa to reside in that State. (14 Stat. L., 507.)

By the act of 1882 the following is provided:

That hereafter the Sacs and Foxes of Iowa shall have apportioned to them from appropriations for fulfilling the stipulations of said treaties no greater sum thereof than that heretofore set apart for them. (22 Stat. L., 78.)

This latter act was so manifestly unjust, perpetuating a wrong against which the Sacs and Foxes of Iowa were then protesting, that Congress, by the law of 1884, provided—

That hereafter the Sacs and Foxes of Iowa shall have apportioned to them, from appropriations for fulfilling the stipulations of said treaties, their per capita proportion of the amount appropriated in this act, *subject to provisions of treaties with said tribes.*

The apportionment named is not subject to Congressional enactment, but to "provisions of treaties." There is no existing treaty provision for the support of a physician or for the purchase of medicines.

It surely will not be contended that Congress intended that the clause of the law providing for a physician and for medicines, at the cost of not exceeding \$1,500, shall have greater force and more controlling effect than the special provisions of law prescribing the manner for the distribution of a large sum of money between two interested and contending portions of a tribe.

It seems hardly necessary to narrow down this item of the claim to the period since the act of 1884; which provides that the apportionment shall be "per capita," "subject to provisions of treaties." It is not consistent with existing treaty provisions that the amount set apart annually by acts of Congress for physician and medicines shall be taken from the \$51,000 before any apportionment is made.

The memorialists accept the finding as to the third claim, stated in the "Statement of account" as follows:

Third claim.—On this claim for their proportionate shares of \$147,393.32, appropriated by the act of April 10, 1869, in payment for lands ceded by the first and second articles of the treaty of February 18, 1867, there is found due them the sum of \$29,184.38 on account of principal, and \$32,832.45 interest thereon, at the rate of 5 per cent per annum from July 1, 1873, to December 31, 1895, inclusive, aggregating \$62,016.83.

The interest on the principal should be calculated to July 1, 1896, or to the date of payment.

It is, however, observed that in the final statement of this third claim in the "Statement of account" a deduction of \$7,600.40 is made from the allowance stated on the third claim, being, as alleged, excess of their proper share of tribal annuities under the decision of the Secretary of the Interior of June 1, 1886. We protest against any such deduction. We contend that the claimants did not receive their pro rata share of the annuities between the years from 1867 to 1894, or to date, inclusive. If, as it is held, "this matter was properly disposed of by Secretary Lamar," and that it consequently can not be reopened for a readjustment for the benefit of the Sac and Fox Indians of Iowa, it should not be disturbed for the benefit of the Sac and Fox Indians of Oklahoma. If it is a settled account as to *one*, it should be and remain a settled account as to *all*.

If it should be reopened for a fair, equitable, and just adjustment of the item annually expended for physician and medicine alone for the Oklahoma Sacs and Foxes, a large balance would be found in favor of the Sacs and Foxes of Iowa.

Wherefore, protesting against so much of the findings of said "Statement of account" as are erroneous and fail of justice to the Sac and Fox Indians of the Mississippi now residing in the State of Iowa, it is respectfully urged that prompt action be taken by the Secretary of the Interior in the further consideration of said account, so as to pay to the claimants, through the present session of Congress, all that is now possible of their just demands, and that so much of claimants' demands as can not be fully and finally determined in time for disposition by the present session of Congress be continued for further investigation.

J. M. VALE,

R. V. BELT,

Of Counsel for the Sac and Fox Indians of the Mississippi.

Hon. Hoke Smith, Secretary of the Interior.

DEPARTMENT OF THE INTERIOR.

WASHINGTON, March 12, 1896.

SIR: I am in receipt of your communication of the 6th ultimo, as attorney for the Iowa branch of the Sac and Fox of the Mississippi Indians, objecting to and contesting certain of the findings in a "Statement of account" between the above-named tribe and the branch thereof referred to, prepared by the Department in conformity with the provisions of the act of Congress approved March 2, 1895 (28 Stat. L., 875-903), a copy of which was furnished for your information and use with Department letter of January 30th last, in compliance with that provision of the aforesaid act requiring that full opportunity be given "to all parties in interest to be heard."

The objections set out in your said communication as to the aforesaid findings are, briefly, that error has been committed; that the findings are in contravention of the facts and of the laws and of the regulations of the Indian Office regarding the payment of annuities to Indians.

In support of these contentions the acts of June 30, 1834 (4 Stat. L., 737); March 3, 1847 (9 Stat. L., 203); August 30, 1852 (10 Stat. L., 41), and August 15, 1876 (19 Stat. L., 199), are cited, and the regulations of the Indian Office applicable to annuity payments are also referred to.

Objection is made to the first finding on the ground that—

More than nine years prior to the enactment of the last quoted provision of law (act of August 15, 1876) the Sacs and Foxes of the Mississippi in Iowa had received the sanction of Congress to remain in that State, and they had received the sanction of the State to reside there twenty years before, with notice to the United States.

The case of certain stray bands of Winnebagoes is also cited as a precedent for the adjustment of the tribal funds as claimed by the Iowa Sacs and Foxes (act of June 25, 1864, 13 Stat. L., 172).

The grounds of objection set up as to the finding in the second claim refer principally to that part of the claim for the share of the said band to the \$1,500 annually for several years appropriated or set aside from the tribal annuities by act of Congress for a physician and the purchase of medicine, the contention being that—

The apportionment named is not subject to Congressional enactment, but to "provisions of treaties." There is no existing treaty provision for the support of a physician or for the purchase of medicine.

167 Sufficient answer to this seems to be warranted by the provisions of the sixth article of the treaty of October 1, 1859 (15 Stat. L., 469), wherein provision is made that—

In order to render unnecessary any further treaty engagements or arrangements hereafter with the United States, it is hereby agreed and stipulated that the President, with the assent of Congress, shall have power to modify or change any of the provisions of former treaties with the Sacs and Foxes of the Mississippi in such manner and to whatever extent he may judge to be necessary and expedient for their welfare and best interest.

This provision of the treaty of 1859 is still in force, and is ample authority for the President of the United States, with the consent of Congress, to make any disposition of the annuities of the tribe that will inure to their benefit, not in conflict with subsequent treaty stipulations or the laws of Congress.

Now, to the finding in the first claim.

Article 3 of the treaty of 1804 (7 Stat. L., 85) provides:

In consideration of the cession and relinquishment of land made in the preceding article, the United States will deliver to the said tribes, at the town of St. Louis or some other convenient place on the Mississippi, yearly, and every year, goods suited to the circumstances of the Indians of the value of one thousand dollars. * * *

Section 9 of article 2 of the treaty of October 21, 1837 (7 Stat. L. 540-541), provides for the investment of \$200,000—

and to guarantee to the Indians an annual income of not less than five per cent, the said interest to be paid to them each year, in the manner annuities are paid, at such time and place, and in money or goods, as the tribe may direct.

Again, by article 2 of the treaty of October 11, 1842 (7 Stat. L., 596), it is agreed:

In consideration of the cession contained in the preceding article, the United States agree to pay annually to the Sacs and Foxes an interest of five per centum upon the sum of eight hundred thousand dollars.

These stipulations constitute the law governing the tribal annuities of the Sacs and Foxes, and are solemn obligations on the part of the Government to annually pay them certain stipulated sums at some "convenient place" or at such "time and place" as the tribe may direct.

The several acts of 1834, 1847, and 1852, cited by you, are general in their scope, conferring discretionary powers on the President and the Department, and in no manner conflict with or contravene the provisions of the aforesaid treaties as to the manner or the time or place or places of the payment of the tribal annuities. The act of August 15, 1876, also cited by you, has no application in this case.

In article 6 of the treaty of 1842 this provision also appears:

It is further agreed that the Sacs and Foxes may, at any time, with the consent of the President of the United States, direct the application of any portion of the annuities payable to them under this or any former treaty. * * *

By this stipulation the Sacs and Foxes retain control of all their annuities, subject to treaty provisions, and this has never been modified, except, as hereinbefore stated, by article 6 of the treaty of 1859, authorizing the President to "modify or change any of the provisions of former treaties," and by certain provisions in the treaty of 1867.

Again, the following provision appears in the said treaty of 1867, article 8 (15 Stat. L., 497):

No part of the invested funds of the tribe, or of any moneys which may be due to them under the provisions of previous treaties, nor of any moneys provided to be paid to them by this treaty, shall be used in payment of any claims against the tribe accruing previous to the ratification of this treaty, unless herein expressly provided for.

168 This stipulation of itself seems to be a complete bar to any claim of the Iowa Sacs and Foxes prior to the date of the ratification of that treaty, October 14, 1868.

Although recognized by this treaty, there is much doubt whether the said Iowa branch would have been entitled to any of its benefits prior to the date of its ratification but for the act of March 2, 1867 (14 Stat. L., 507), under the provisions of which a payment was made to them in that year.

There seems to be little similarity between this case and that of the Winnebagoes, cited by you, except that in both instances small bands strayed away and remained separated from their tribes. In fact, in other respects they are totally different, as will appear upon a statement of the cases.

The Iowa Sacs and Foxes settled in that State, some of them several years prior to 1867 and others between 1862 and 1866, and were recognized by act of Congress in the year first named, and by the treaty with the tribe made in the same year, not in the original draft of the latter, however, but being named in an amendment prepared in the Senate when the articles were before that body for consideration, on July 25, 1868, more than a year subsequent to the conclusion of the treaty between the contracting parties.

In compliance with the above-named act of Congress payments to them were immediately begun and have continued ever since, with

varying amounts, to conform with the requirements of subsequent legislation in their behalf.

In the case of the Winnebagoes, it appears that certain stray bands of this tribe remained in Wisconsin and Minnesota, upon lands ceded to the United States by treaty of 1859 (12 Stat. L., 1101), failing to go with the rest of the tribe upon the diminished reserve created by that treaty.

In 1864, by act of June 25. of that year (13 Stat. L., 172), Congress, in making an appropriation for "deficiencies in subsistence and expenses of removal and support of the Sioux and Winnebago Indians of Minnesota, during the fiscal year ending June thirtieth, eighteen hundred and sixty-four," enacted the following relating to the Winnebagoes:

Provided. That the proportion of annuities to which said stray bands of Pottawatomies and Winnebagoes would be entitled if they were settled upon their reservations with their respective tribes shall be retained in the Treasury to their credit, from year to year, to be paid to them when they shall unite with their said tribes. * * *

At the time of this legislation the Winnebago tribe had been removed to the then Territory of Nebraska, under the provisions of the act of February 21, 1863 (12 Stat. L., 658), but the stray bands referred to, having failed to rejoin the tribe in Wisconsin, did not accompany their brethren to the new reservation in Nebraska.

The provisions of the act of 1864 seem not to have been complied with; therefore by act of January 18, 1881 (21 Stat. L., 315), Congress directed that a census be taken of those residing in Nebraska and Wisconsin, and that the proportion of the annuities of the latter for the period from the date of the aforesaid act of 1864 be ascertained and paid to them, a method of adjustment between the two branches of the tribe being provided for in the said act of 1881.

In this case, therefore, it appears that the provision of law requiring the proportion of annuities due the aforesaid stray bands of Winnebagoes to be retained in the Treasury for their benefit was not fulfilled, and that, by subsequent act of Congress, these arrear-
169 ages were made good to them, but no provision was made for any arrearages prior to the act of 1864, nor were any ever paid, although the said stray bands were separated and absent from their tribe from or prior to the date of the treaty with the tribe of April 15, 1859, before noted.

That it was not the practice or custom, but was against the policy of the Department to pay annuities to Indians off their reservations, is well established by the following extract from a letter, dated September 17, 1863, of the Secretary of the Interior to Francis Beveridge, who had petitioned in behalf of certain Winnebago Indians, then living off their reservation, for their distributive shares of the tribal annuities (Interior Department files, record of letters sent, vol. 4, p. 376), viz:

* * * The policy of the Government is to establish the Winnebagoes in such manner as will enable them to obtain their living by agricultural pursuits, and to that end large expenses have been incurred in the preparation of their new homes, on the upper Missouri, for the experiment; and the information possessed by the De-

partment encourages the belief that the effort will be attended with success. All the means possessed by the Winnebagoes are necessary to the successful prosecution of the enterprise, and the proposition to parcel out their funds can not, therefore, be entertained.

If the parties asking the distribution of these annuities in Minnesota have become so far civilized as to justify their remaining in that State, and taking upon themselves the duties of citizens, they can not, if they remain in the State, expect to be treated by the Department as Indians. All has been done for them by the Government that they had a right to expect. * * * If they desire, still, to be considered Winnebagoes they must unite with their tribe at their new home, and share their perils, as well as their fortunes. * * *

The request of the petitioners can not be granted.

Very respectfully, your obedient servant,

J. P. USHER,
Secretary of the Interior.

The Sacs and Foxes of Iowa had less cause for withdrawing from the tribe than had these Winnebagoes in their refusal to rejoin theirs. The latter tribe had just been removed from their old homes to a new reservation in another Territory, where their affairs were as yet necessarily unsettled and the new life an experiment.

The Iowa Sacs and Foxes, however, had remained upon their new reservation in Kansas for a period of about ten years (a part of them for many years more) prior to their separation from the tribe. In that time they had the opportunity to become accustomed to their surroundings; implements for farming were furnished; annuities regularly paid there, and everything possible done to make them comfortable and for their welfare. But they left their reservation and went to Iowa, for what reason? They say because—

The locality of the said new reservation in Kansas proving to be not so healthful, and becoming for this and other reasons dissatisfied with the change, a portion of the tribe returned to the State of Iowa prior to the year 1855.

Their assertion of the unhealthfulness of the new locality has been shown to be a fallacy. Capt. John Beach, their agent, prior and subsequent to their removal in 1845, gives very positive and decided testimony on this point, as has been shown in the "Statement of account."

That the aforesaid policy of the Government was wise can not be doubted. Had all the dissatisfied and disgruntled bands of Indians been permitted to separate from their tribes at will and allowed to set up separate establishments, the Government would have been put to much additional trouble in caring for them, and enormous additional expenditures would have been involved. Upwards of \$40,000 have been thus expended by the Government in the past twenty-nine years in maintaining a separate establishment for the Sacs and Foxes in Iowa alone.

170 Misapplication is alleged of article 7 of the treaty of 1859 to the case of the Sacs and Foxes of Iowa, as quoted in the "Statement of account." You say:

No annuities for the tribe were created by that treaty. No claim is based upon that treaty, near or remote, and it has no bearing upon the annuities of the tribe.

It is true that no annuities were created by that treaty; but it is also true that article 6 of the same treaty gives the President of the United States, with the consent of Congress, jurisdiction over any of the provisions of former treaties, to "whatever extent he may judge to be necessary and expedient for their welfare and best interest." To that extent article 7 has application to the Iowa branch.

But application of the aforesaid article in the "Statement of account" was made with especial reference to those of the Iowa branch who left their reservation in Kansas in 1862 and later years, and who were parties to the treaty of 1859.

It is not doubted, however, if there had been any specific benefits, remote or near, accruing to the tribe under the said treaty, and if the proceeds of the surplus lands sold under the fourth article had realized a sum over and above the amount of the tribal debts, provided by the fifth article to be paid from such proceeds, that the memorialists would have claimed their share thereof.

Objection is made also to the deduction of the sum of \$7,600.40 from the finding on their third claim, on account of excessive payments to the memorialists in the fiscal years 1885 and 1886.

In support of this objection you say:

We protest against any such deduction. We contend that the claimants did not receive their pro rata share of the annuities between the years from 1867 to 1894, or to date, inclusive. If, as is held, "this matter was properly disposed of by Secretary Lamar," and that it consequently can not be reopened for readjustment for the benefit of the Sac and Fox Indians of Iowa, it should not be disturbed for the benefit of the Sac and Fox Indians of Oklahoma. If it is a settled account as to *one*, it should be and remain a settled account to *all*. If it should be reopened for a fair, equitable, and just adjustment of the item annually expended for physician and medicine alone for the Oklahoma Sacs and Foxes, a large balance would be found in favor of the Sacs and Foxes of Iowa.

In his letter of March 27, 1886, submitting the questions upon which Secretary Lamar made the rulings set out in his letter of June 1, 1886, the Commissioner of Indian Affairs requested instructions as to the action he should take with respect to future distribution of annuities between the two branches of the tribe—whether the \$5,000 for the support of government, the \$5,000 for support of schools, and the \$1,500 for physician and medicine should be deducted before calculation was made of the proportion due to each of the said branches, stating that such information was necessary to enable his office to make proper distribution of the fund appropriated or about to be appropriated for the ensuing fiscal year, "or whether the whole amount should be divided as has been the practice for the last two years, and require the Indians in the Indian Territory to pay the expenses of their school, national government, and physician out of the sum of \$25,200, their present quota of the annual appropriation for said Indians."

The question of the action of the Indian Office in withholding in the two preceding fiscal years annuities due the Oklahoma branch under treaty provisions was not submitted by the Commissioner in his letter of March 27, except incidentally, as stated, and was not passed upon by the Secretary of the Interior in his letter of June 1.

It is manifest, therefore, that sums due them under the solemn obligations of treaties, and to which they were justly entitled, were withheld from the Oklahoma branch, and that the Iowa branch, having no claim thereto, were the beneficiaries of these sums.

The question of the restitution of these sums has never before been passed upon by the Department. It is not questioned that if the matter had been submitted for decision the Department would promptly have directed an adjustment thereof between the two branches of the tribe.

Nor is it doubted that the Department has full jurisdiction in the matter, under the act of March 2, 1895, directing the examination of the claim of the Sacs and Foxes of Iowa for their share of the tribal annuities, etc.

The findings set out in the aforesaid "Statement of account" are hereby affirmed.

Very respectfully,

HOKE SMITH, *Secretary.*

J. M. Vale, Esq., Atlantic building, city.

172 *Motion for Call Upon the Secretary of the Treasury.*

The Claimants move for a call upon the Secretary of the Treasury for a report from the accounts of disbursements of the annuities of the Confederated tribes of the Sac and Fox Indians of the Mississippi, on file in his Department, of the amounts paid to and expended for the Sac and Fox Indians of the Mississippi in Iowa, and the amounts paid to and expended for the Sac and Fox Indians of the Mississippi in Oklahoma, for each year for the period from 1900 to the date his said report shall be made.

Reference is here made to the report made by the Secretary of the Treasury, on Dec. 2, 1901, in response to a resolution of the House of Representatives, printed in H. R. Doc. No. 38, 57th Congress, 1st session, and referred to in the petition in this cause, as evidence, which H. R. Doc. No. 38, contains the information from the accounts of disbursements for the period from 1855 to 1899, both exclusive. The object and purpose of this call is to secure exactly similar information for the period since beginning of 1900, so that, when furnished, it, together with the information contained in said H. R. Doc. 38 will cover the whole period of the claims, suit upon which has been instituted in this Court, under the Act of Congress approved March 1, 1907,—Public No. 159.

R. V. BELT,

Attorney for Claimants.

Filed April 11, 1907.

Allowed and issued May 7, 1907.

EXHIBITS
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EXHIBITS
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Court of Claims.

No. 29994. (In Equity.)

THE SAC AND FOX INDIANS OF THE MISSISSIPPI IN IOWA
vs.THE SAC AND FOX INDIANS OF THE MISSISSIPPI IN OKLAHOMA and
THE UNITED STATES.

I, Archibald Hopkins, Chief Clerk of the Court of Claims certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the findings of fact and conclusion of law filed by the court; of the opinion of the court; of the final judgment of the court; of the application for, and allowance of, appeal to the Supreme Court of the United States; of the motion of claimants to include the whole record in transcript, and of the defendants' objections to same; of the allowance of the court of said motion; and of the record referred to in said motion.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims this 20th day of June, 1910.

[Seal Court of Claims.]

ARCHIBALD HOPKINS,
Chief Clerk Court of Claims.

Endorsed on cover: File No. 22,235. Court of Claims. Term No. 614. The Sac and Fox Indians of the Mississippi in Iowa, appellants, vs. The Sac and Fox Indians of the Mississippi in Oklahoma and The United States. Filed June 21st, 1910. File No. 22,235.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1910.

No. 614.

THE SAC AND FOX INDIANS OF THE MISSISSIPPI IN IOWA,
Appellants,

vs.

THE SAC AND FOX INDIANS OF THE MISSISSIPPI IN OKLA-
HOMA AND THE UNITED STATES.

Appeal from the Court of Claims.

MOTION TO ADVANCE.

*To the Honorable, the Chief Justice and Associate Justices
of the Supreme Court of the United States:*

The Appellees, the Sac and Fox Indians in Mississippi in
Oklahoma respectfully move this honorable court to advance
this case upon the docket to the end that the same may be

heard at as early a date in the October, 1910, Term as may be convenient to the Court and in support thereof state as follows:

I.

The act of Congress conferring jurisdiction upon the Court of Claims and this court, pursuant to which this case was instituted *inter alia* provides as follows:

"Said suit, on motion of either of the parties thereto, shall be advanced on the dockets of either of said courts and be determined at the earliest date practicable." (Act approved March 1, 1907, 34 Stats. L., Pt. 1, p. 1055, Rec., pp. 1, 2.)

II.

Although the Court of Claims advanced the case for early hearing, prolonged delay was encountered in that court by reason of the motion of claimants for a new trial and amendments of the findings of facts (Rec., 34). Such delay has put the appellee Indians to great expense which was and is now being paid out of their share of the income from the tribal funds.

III.

The *per capita* distribution of the corpus of the tribal funds, amounting to over one million dollars, is withheld awaiting the final determination of this case by this court.

Respectfully submitted,

A. R. SERVEN,
BARRY MOHUN,

*Attorneys for Appellees, the Sac and Fox Indians,
of the Mississippi in Oklahoma.*

Dated October 5, 1910.

NOTICE OF MOTION.

Please take notice that the foregoing motion to advance will be submitted to the Supreme Court of the United States on Monday, the 10th day of October, 1910, at the opening of the Court on that day or as soon thereafter as counsel can be heard.

A. R. SERVEN,
BARR MOHUN,

*Attorneys for Appellees, the Sac and Fox
Indians of the Mississippi in Oklahoma.*

*To Honorable JAMES A. FOWLER, Acting Attorney-General
of the United States, Attorney for Appellees, the
United States.*

MESSRS. KAPPLER AND MERILLAT,
Attorneys for Appellants.

Service of this motion is hereby acknowledged and the United States consents that said cause may be advanced.

J. A. FOWLER,
Acting Attorney-General.

We consent to advancement of the cause for any date after January 1, 1911.

CHARLES H. MERILLAT,
Attorney for Appellants.

Supreme Court of the United States.

No. 614.

OCTOBER TERM, 1910.

THE SAC AND FOX INDIANS OF THE MISSISSIPPI IN
IOWA, *Appellants*,
vs.

THE SAC AND FOX INDIANS OF THE MISSISSIPPI IN
OKLAHOMA AND THE UNITED STATES, *Appellees*.

BRIEF ON BEHALF OF APPELLANTS.

This is an appeal by the appellants (petitioners or plaintiffs below) from a decree of the Court of Claims (Trans. Rec., p. 40), dismissing the petition of the appellants whereby they sought to recover from the appellee Indians and the United States a large sum of money on account of the alleged failure of the United States to pay the appellant Indians the moneys claimed to be due them or the proper amount due, under treaties and laws of the United States, and which moneys lawfully due to appellants the United States illegally, as is alleged, paid to appellee Indians, the same constituting overpayments to appellee Indians. The whole controversy has its origin in the appellant Indians, tribal brethren of the appellee Indians, between 1854 and 1867 leaving their fellow Sac and Fox tribesmen and their former reservation in Kansas to which in common with appellee Indians they had been removed by the United States and returning to their

former home in Tama County, Iowa. The removal from Kansas followed at least two practically complete crop failures after 1850, a smallpox epidemic and a severe death dealing attack on the Sac and Fox from the more powerful and warlike Comanches and Osages. The claims embraced within the petition dismissed (Rec. 12-16) are five in number: For annuities unpaid or forfeited between 1855 and 1866, both inclusive, the United States not paying appellants any annuities (save the small sum of five thousand dollars in 1866 as a charity) after their removal from Kansas until the year 1867; for the difference between the annuities appellants were paid and what they claim they should have been paid under the act and treaty of 1867 on the basis of their numbers as compared with the numbers of the whole tribe, the United States paying appellants one unvarying sum from 1867 to 1884, notwithstanding their numbers increased and those of appellee Indians decreased steadily each year; for a similar annuity difference on the basis of comparative numbers from 1884 to date, the United States under the act of 1884 fixing a ratio between appellant and appellee Indians and never varying it nor making annual rests, notwithstanding appellants numbers increased almost from year to year and appellee Indians numbers decreased; for an annual sum alleged to be due appellants for pay of their chiefs, alleged to be the chiefs of the Fox tribe of the confederated Sac and Fox tribes, from 1855 to 1900, both inclusive, appellants chief having received this \$500 annuity beginning with the year 1900; for their proportionate share of the proceeds of tribal lands disposed of under the treaty made with the U. S. in 1859.

The jurisdictional act (Rec. 2 and 34, 34 Stats., 1055)

of March 1, 1907, under which the claims are here for judicial determination, voided of its purely administrative machinery, reads as follows:

"That full legal and equitable jurisdiction, without regard to lapse of time, is hereby conferred upon the Court of Claims to hear, determine, and adjudicate, as justice and equity shall require, with right of appeal to the Supreme Court of the United States by any party in interest, all claims of the Sac and Fox Indians of the Mississippi in Iowa, against the Sac and Fox Indians of the Mississippi in Oklahoma, and the United States for money claimed to be due to them as their proportionate shares, according to their numbers, and not heretofore paid to or expended for them, of the appropriations made by Congress for fulfilling treaty stipulations with the confederated tribes of the Sac and Fox Indians of the Mississippi, or arising from the disposal or sale of lands of said confederated tribes, or otherwise, including the claims set out in the Senate Document Numbered Sixty-four, Fifty-seventh Congress, first session. * * * The reports made to Congress on any of said claims by any Department of the Government and printed as congressional documents shall be received as evidence in said suit, so far as the facts therein may be concerned, and shall be given such weight as the court may determine for them."

The claims set out in Senate Document Sixty-four *supra*, were the first four claims heretofore outlined (the claim from 1884, however, being brought down to date instead of ending in 1900 as in the Senate document), the fifth claim for a share of land sales under the Treaty of 1859 not being included in the Senate document.

Statement of the Case and History of the Claims.

The history of the Sacs and Fox of the Mississippi, so far as concerns their relations with the United States as confederated or united tribes (the United States having an earlier treaty with the Wyandottes, Sacs alone and others in 1789, 7 Stats., 28, and 2 Kappler Laws and Treaties, 18) begins with the Treaty of Nov. 3, 1804 (7 Stats., 84; 2 Kappler, 74), entered into between Gen. William Henry Harrison, representing the United States, and the United Tribes of Sac and Fox Indians, whereby, in return for a cession of lands along the Illinois, Fox and Mississippi Rivers the United States, by Article 3, granted a perpetual annuity to the Indians in goods of \$1,000 (of which \$600 are intended for the Sacs and \$400 for the Foxes).

The War of 1812 split the Sacs into two or more branches, the United States in 1815 and 1816 making separate treaties with the Sacs of the Missouri and the Sacs of the Rock River (7 Stats., 134 and 141; 2 Kappler, 120 and 126) and another treaty with the Fox tribe (7 Stats., 135; 2 Kappler, 121), all three treaties specifically assenting to the aforesaid Treaty of Nov. 3, 1804. The treaty with the Sacs of Rock River is noteworthy in that by Article 3 it was agreed, that if the tribe should fail or neglect to give up certain plundered or stolen property by July 1, 1816, "they shall forfeit to the United States all right and title to their proportion of the annuities which, by the Treaty of St. Louis (that of Nov. 3, 1804, *supra*), were covenanted to be paid to the Sac Tribe; and the United States shall forever afterwards be exonerated from the payment of so much of said annuities as upon a fair distribution would

fall to the share of that portion of the Sacs who are represented by the undersigned Chiefs and Warriors."

By Treaty between the United States and the Sacs and Foxes of August 4, 1824 (7 Stats., 229; 2 Kappler, 207), the United States, in consideration of certain quit-claims to alleged rights in land, agreed to pay to the Sacs and Foxes, in addition to the annuities stipulated in the Treaty of 1804, \$1,000 down and \$1,000 annually for ten years, and in addition thereto by Article 4 engaged "to provide and support a blacksmith for the Sac and Fox Nations so long as the President of the United States may think proper."

By Treaty of August 19, 1825, the United States made peace and defined boundaries between the Sacs and Foxes, the Sioux, Menominees, Pottawatomies, Winnebagoes, and other Indians.

By Treaty of September 21, 1832 (7 Stats., 374; 2 Kappler, 349), the United States received certain large cessions of land along the Mississippi and Missouri and Iowa Rivers, and in consideration thereof, by Article 3, agreed to pay to the Confederated Sac and Fox Tribes the present Indians, the Sacs of the Missouri being a wholly different entity, as shown by treaties, annually for thirty successive years, beginning with September, 1833, \$20,000 in specie, and further to maintain for the Sacs and Foxes for said thirty years one additional blacksmith and gunsmith shop with necessary tools, iron and steel, besides an allowance of forty kegs of tobacco and forty barrels of salt, the Indians further covenanting, by Article 8, that certain of their hostile members should never thereafter be permitted to maintain separate bands or villages, but should be divided "among the neutral bands of the said tribe according to blood, the Sacs among the Sacs and the Foxes among the Foxes."

By Treaty of October 21, 1837 (7 Stats., 543; 2 Kappler, 497), in return for a cession of 1,250,000 acres of land the United States agreed among other things to pay the debts of the Confederated Tribes of Sacs and Foxes and further (8th paragraph of Article 2), "to invest the sum of \$200,000 in safe State stocks and to guarantee to the Indians an annual income of not less than five per cent, the said interest to be paid to them each year in the manner annuities are paid, at such time and place and in money or goods as the tribe may direct: *Provided*, That it may be competent for the President to direct that a portion of the same may, with the consent of the Indians, be applied to education or other purposes calculated to improve them."

By Article 3 it was agreed that the United States would continue in the country to which the Sacs and Foxes were to remove, the two blacksmith's establishments and the gunsmith's establishment provided for in previous treaties.

By Treaty made October 11, 1842 (7 Stats., 596; 2 Kappler, 546), with the Confederated Tribes of Sacs and Foxes (prior treaties showing the Sacs of the Missouri by this time to be a wholly different entity), in return for certain further landed cessions by the Sac and Fox Indians of the Mississippi, the United States stipulated:

"In consideration of the cession contained in the preceding Article the United States agree to pay annually to the Sacs and Foxes an interest of five per centum upon the sum of \$800,000, and to pay their debts mentioned in the schedule annexed to and made a part of this treaty, amounting to the sum of \$258,566.34, and the United States also agree—

First, That the President will, as soon after this treaty is ratified on their part as may be ~~covenanted~~ *convenient* assign a tract of land suitable and convenient for Indian purposes, to the Sacs and Foxes for a permanent and perpetual residence upon the Missouri River or some of its waters. The United States also agreed it would 'establish and maintain two blacksmith and two gunsmith shops convenient to their agency, and will employ two blacksmiths with necessary assistants and two gunsmiths to carry on the said shops for the benefit of the Sacs and Foxes, one blacksmith and one gunsmith shop to be employed exclusively for the Sacs, and one of each to be employed exclusively for the Foxes.'

By Article 3 the Indians agreed: 'That so soon after the President shall have assigned them a residence upon the waters of the Missouri, as their chiefs shall consent to do so, the tribe will remove to the land so assigned them; and that if they do not remove before the expiration of the term of three years, they will then remove at their own expense.'

Article IV provided: 'It is agreed that each of the principal chiefs of the Sacs and Foxes, shall hereafter receive the sum of five hundred dollars annually, out of the annuities payable to the tribe, to be used and expended by them for such purposes as they may think proper, with the approbation of their agent.' "

Articles 5 and 6 read as follows:

ARTICLE V.

It is further agreed that there shall be a fund amounting to thirty thousand dollars retained at each annual payment to the Sacs and Foxes, in the hands of the agent appointed by the President

for their tribe, to be expended by the chiefs, with the approbation of the agent, for national and charitable purposes among their people; such as the support of their poor, burying their dead, employing physicians for the sick, procuring provisions for their people in cases of necessity, and such other purposes of general utility as the chiefs may think proper, and the agent approve. And if at any payment of the annuities of the tribe, a balance of the fund so retained from the preceding year shall remain unexpended, only so much shall be retained in addition as will make up the sum of thirty thousand dollars.

ARTICLE VI.

It is further agreed that the Sacs and Foxes may, at any time, with the consent of the President of the United States, direct the application of any portion of the annuities payable to them, under this or any former treaty, to the purchase of goods or provisions, or to agricultural purposes, or any other object tending to their improvement or calculated to increase the comfort and happiness of their people.

This treaty was executed by Governor John Chambers, then Governor of the Territory of Iowa and *ex officio* Superintendent of Indian Affairs for Iowa Territory, as Commissioner on the part of the United States, at the Sac and Fox agency in the Territory of Iowa, the Sacs and the Foxes each signing separately, as shown by the treaty (2 Kappler, 548), twenty-two members signing for the Sacs and twenty-two others for the Foxes. All of the Indians signed by mark.

The effect of this agreement was to require the Indians to remove from their home in the vicinity of Tama, Iowa, to the State of Kansas, the new home selected by

the President. This removal was effected in the year 1845 and subsequent years, as appears by contemporaneous reports of the Commissioner of Indian Affairs. The Foxes seem to have been reluctant to make the treaty and were slower than the Sacs in removing to Kansas.

The histories of the places and of the times, matters of which the court will take judicial notice, show that the Indians' Iowa home was fertile and comparatively healthy and that the land assigned the Sacs and Foxes in Kansas was sandy and among the poorest as to soil in that part of Kansas; that absolute crop failures are practically unknown in Iowa and were then, and to an extent still are, frequent in Kansas and especially on thin, sandy soil; that the section of Kansas in question was considered unhealthy. The Sacs and Foxes in 1845 and for more than twenty years at least later were blanket Indians, not one of them wearing white garb, living in bark houses, shaving their heads and painting universally and living largely by the chase. The section chosen for their Kansas home felt the surge of white population very shortly after the Indians' removal, and this population included a large, reckless element, who introduced liquor freely among the Indians, not only the Sacs and Foxes but other of their Indian neighbors.

Under date of October 15, 1849, the agent for the Kansas Sac and Fox and other Indians reported (Report Commissioner of Indian Affairs 1849-50, p. 155):

"The Sac and Fox tribe I found in a very unsettled condition, and requiring, of necessity, a rigid course of government by their agent."

The agent, p. 157, reported that murders were frequent among the Sacs and Foxes and among the Kansas and Miami Indians.

Under date of September 17, 1851, John R. Chenault, agent for the Sacs and Foxes, Ottawas, Chippewas, Potawatomes and Kansas Indians, reported (Report Commissioner of Indian Affairs 1851, page 326) :

"When I first arrived at what was then the Osage River Agency I ascertained, owing to the unparalleled drought which prevailed in this region during the summer of 1850, a very small quantity of corn had been raised by any of the tribes in my agency and that they were all very destitute of the means to subsist on during the winter. The confederated tribes of Sacs and Foxes numbering, according to an enrollment made in May last, twenty-six hundred and sixty, being much the largest tribe in the agency, occupying a country in which the soil is very sandy and greatly inferior in quality to that occupied by any other tribe over which I had any control, were in a much worse situation than the others."

The report further said :

"The Sacs and Foxes speak the same language, and are more opposed to schools, missionaries, and to building houses, than any other tribe on the northwestern frontier. * * * Sometime in May a Missouri Sac, who had been exposed to smallpox, came to a village in the Sac and Fox country, and in a few days after his arrival he broke out with the smallpox. This disease which has been one of the severest scourges that ever befell the Indian race, rapidly spread to most of the Sac and Fox villages, and, as a majority of the cases were of the confluent form, many of them fell victims to it. The Indians became alarmed."

The agent then spoke of a large number of the Indians

having been inoculated and said that of about 1,700 inoculated some forty had died, and added :

"The Sacs have gotten through with smallpox ; but a large band of Foxes, I regret to state, were so completely under the influence of an old Winnebago prophet, who resides among them, that they were deterred by him from being inoculated ; the result is, that they are yet suffering with this disease, and have, with the hope of getting rid of it, scattered in every direction. * * * From the best information I can get, I think about three hundred of the Sacs and Foxes of Mississippi have died since the latter part of May, 1851."

The Commissioner of Indian Affairs in his annual report, under date of November 30, 1852 (p. 7), said as to the Sacs and Foxes :

"The smallpox, reinforced by inebriety and general dissoluteness, has this year dealt sternly with the Sacs and Foxes. Their numbers have been thinned by death with unsparing hand. Agriculture is almost entirely neglected, and their attachment to old habits, encouraged by their despotic chiefs, materially retards their improvement."

Indian Agent Chenault under date of Sac and Fox Agency, October 3, 1852 (Report Commissioner of Indian Affairs, 1852, p. 91), reported :

"In my former report I informed you that the Sacs and Foxes had suffered greatly from smallpox and other diseases, and that I was of opinion, from the best information I could then obtain, that about three hundred of them had died since the last of May, 1851. I am now convinced

that the mortality last year in this tribe was greater than I supposed it to be when I made my former report, and I regret to state that a large number of deaths also occurred among them during the past winter from pneumonia and other diseases, while they were absent on their winter hunt. The country in which they live is certainly a healthy one, and the rapid decrease which is evidently going on in this tribe is to be ascribed, in part, to their frequently indulging in drunken frolics."

The agent reported that under certain traders' systems in vogue the Indians were greatly defrauded. He also urged, as he had previously, new treaties be made with the Sacs and Foxes and other tribes of his agent, whereby their surplus lands would be opened up, consent secured that present Sac and Fox annuities be used for agricultural and school purposes and the Indians be compelled to follow agricultural pursuits.

The annual report of the Commissioner of Indian Affairs for 1853 includes a report by Commissioner George W. Manypenny to the Secretary of the Interior, dated November 9, 1853, in which he states (pp. 270-71) that while in the Indian country he held council with the Sacs and Foxes of the Mississippi regarding cessions of their lands, he about this time securing land treaties from the Wyandottes, Pottawatomies and other tribes. His report states:

"The Sacs and Foxes of the Mississippi, who reside on the Osage River, were divided; the Sacs were desirous of selling all the land, and the Foxes opposed to selling any portion of it; but the latter being less numerous than the former, proposed finally an equal division of both land and annuities."

Commissioner Manypenny's annual report (Report Commissioner of Indian Affairs 1853, p. 248), stated that at this time "the Sacs and Foxes are a wild, roving race, depending almost entirely on the chase for subsistence. They have heretofore strongly resisted the introduction of schools or missionaries among them, and have made a steady and powerful effort to maintain all the manners, customs, and traditions of their fathers."

Under date of the Sac and Fox Agency, September 1, 1853 (Report Commissioner of Indian Affairs 1853, p. 342), their new Indian agent, B. A. James, reported concerning the Sacs and Foxes as follows:

"The Sacs and Foxes numbered at the last payment about 2,173 persons; they are a wild and roaming race, looking principally to the chase for a support, with a few exceptions."

The treaties with Indians of the United States show that in response to the call of white settlement that the Indians be again moved from what had been assigned them only a short period before as their permanent homes the neighboring Indians to the Sac and Fox in Kansas and Missouri quite generally were required to and did make further cessions of land comprising their so-called permanent home, Indian Commissioner George W. Manypenny visiting them and obtaining land treaties from the Otoes and Missourias, the Omahas, Delawares, Shawnees, Iowas, Sacs and Foxes of Missouri, Kickapoos, Keskakias, Peorias, Piankeshaws and Weas and Miamis (2 Kappler, 608-641). No treaty was secured at this time with the Sacs and Foxes of the Mississippi. Smallpox had been prevalent and at the time of Commissioner Manypenny's trip probably still prevailed.

The Report of the Commissioner of Indian Affairs for the year 1854 (p. 8), under date of November 25, 1854, reported that the crops of the Indians within the four agencies embracing the Delawares, Shawnees, Wyandots, Pottawatomies, Kansas and Sacs and Foxes of the Mississippi, Chippewas, Ottawas, Kaskaskias, Peorias, Weas, Piankeshaws, and Miamies, have, to a very great extent, failed, and suffering to an unusual degree will only be prevented by the application of a portion of the ample money-annuities.

A previous report stated the Sac and Fox had the poor land in this vicinity.

Indian Agent James, with the Sacs and Foxes, under date of September 1, 1854, reported that his annual report would be short, inasmuch as he had been down with an attack of fever, and added:

"We have had an uncommonly dry season, and from what I have seen and reports from others, I am confident that the Indians within the limits of my agency (the Sac and Fox) will not raise 100 bushels of corn and scarcely any potatoes or vegetables of any kind. With the large amount of emigration settling around them, this must necessarily make provisions for the next year very high."

In the same report (p. 104) the agent said:

"On the second of August, by the request of the chiefs and headmen of the Sac and Fox Tribe of Indians, I reported to the honorable Commissioner of Indian Affairs, through your office, an account of an attack made on the Sacs and Foxes by the Comanches, Arapahoes, and Osages,

about the tenth of July, one hundred miles west of Fort Riley."

Sometime in the winter of 1854-1855 a band of appellant Indians, practically all of the Fox Tribe, arrived at their old home in Tama County, Iowa, and settled down there. The exact date of their departure from Kansas is not definitely established, but the record does show they received no annuities subsequent at least to 1854, until Congress, by Act in 1867, directed they should be paid their pro rata share of Sac and Fox of the Mississippi annuities. The arrivals at this time in Tama County numbered 144 (Rec. pp. 55, 91, 118, 120). They reported their arrival to Gov. John Chambers, Iowa then being a State and her chief executive the same man who, as Territorial Governor and ex officio Superintendent of Indian Affairs, had negotiated the Treaty of 1842, under which they had removed to Kansas. The Iowa legislature in July, 1856, passed an act reading as follows:

"Section 1. *Be it enacted by the General Assembly of the State of Iowa*, That the consent of the State is hereby given that the Indians now residing in Tama County, known as a portion of the Sacs and Foxes, be permitted to remain and reside in said State, and that the Governor be requested to inform the Secretary of War thereof, and urge on said department the propriety of paying said Indians their proportion of the annuities due or to become due to said tribe of Sac and Fox Indians.

"Sec. 2. That the sheriff of said county shall, as soon as a copy of this law is filed in the office of the county court, proceed to take the census of said Indians now residing there, giving their

names and sex, which said list shall be filed and recorded in said office; the persons whose names are included in said list shall have the privileges granted under this act, but none others shall be considered as embraced within the provisions of said act.

"Sec. 3. This act shall take effect from and after its publication in the *Iowa Capital Reporter* and *Iowa City Republican*, published at Iowa City.

"Approved, July 15, 1856."

If a census was taken of the Indians the same has not been located (Rec. 63).

The Indians, shortly after this act was passed, purchased a small tract of land in common with the little money they had taken to Iowa with them and since then have lived a communal life on the same, with a chief and later a tribal council, and, from 1867, under the protection of a United States Indian Agent (Rec. pp. 55, 90, 91, 129, 118, 120-121, 130, and Report of Commissioner of Indian Affairs dated Nov. 15, 1867, Annual Report for 1867, page 25, and of Special Indian Agent Clark to the Sacs and Foxes of the Mississippi in Iowa, Annual Report Commissioner of Indian Affairs for 1867, page 347). The title to the land they purchased was held in trust for them by the Governor of Iowa (Rec. 55), and later by the United States.

At this time the statute of the United States then and for many years later in force and effect, respecting payment of annuities and other moneys to Indians, was the Act approved August 30, 1852 (10 Stat., 56), and read as follows (Rec. p. 9):

"That no part of the appropriations herein made, or that may be hereafter made, for the

benefit of any Indian or tribe, or part of a tribe of Indians, shall be paid to any attorney or agent of such Indian or tribe, or part of a tribe; but shall in every case be paid directly to the Indian or Indians themselves to whom it shall be due, or to the tribe, or part of a tribe per capita, unless the imperious interest of the Indian or Indians, or some treaty stipulation shall require the payment to be made otherwise, under the direction of the President."

This act applied to annuities to the Sacs and Foxes. It was a repeal of the Act of March 3, 1847 (Rec. 9; 9 Stats., 203), which sought to lessen the power of the Indian chiefs who, under the Act of June 30, 1834, and the practice of the Government had largely the power of the purse among their Indian followers and which power they used as at least some Indian agents reported in a despotic manner and adversely to the influence and desires of officials of the Indian service. Thus Indian Agent Chenault, under date of Sac and Fox Agency, Oct. 3, 1852 (Annual Rep. of Comsr. Ind. Affs. for 1852, pp. 91-92), reported:

"Under the old system of paying annuities to the chiefs, this despotic rule (that of the headmen) was more rigidly enforced than it is at present; for, so long as the chief-payment was practiced, the credits given by traders, based upon the expectation of payment out of the annuity, were given to the chiefs, and a few braves distributed the goods purchased as their own whims or caprices dictated. Such a system of paying annuities was well calculated to increase the power of the chiefs, and to crush and destroy every manly and independent feeling in the bosom of the masses. The present system of paying an-

nuities to heads of families has had a salutary influence in breaking down, to some extent, the despotic influence of a few chiefs and braves."

Those Sac and Fox Indians who arrived at their old home in Tama County, Iowa, in the winter of 1854-55, continued there, eking out a bare livelihood by trapping in winter, cultivating their communal tract to some extent, and begging when compelled. They were nearly, if not quite all, of the Fox Tribe (Rec. 55-6, 63, 72, 91, 118-120, and first Annual Report of Special Indian Agent Clark, *supra*). No evidence obtains that these 144 ever returned to Kansas or received any annuities. The record contains no evidence that they or those who, in the sixties, after the making of the Treaty of 1859 joined them, ever disturbed the people of Iowa, or that they were disturbed or their presence resented by the people of Iowa (Annual Report of Comsr. Ind. Affs., pp. 25-26).

The Sacs and Foxes at this time, and for many years later, were blanket Indians and without any set form of government other than that certain men were recognized as chiefs and headmen and that they held their property in common.

The Commissioner of Indian Affairs, in his annual report for 1853, pages 250-51, said:

"Except the Wyandotte and Ottawas, who have a few single laws, all the Indian tribes north of the Cherokee line are without any prescribed form of government."

In the Annual Report of the Secretary of the Interior for 1855 (p. 274, Report No. 121), a statement was

made of the Indian tribes to whom per capita payments in money had been made in the year 1854. This report stated the Sacs and Foxes of the Mississippi numbered 1626; that their per capita payment had been \$24.50 and the total amount paid them was \$40,000.

Report No. 122 was a

“statement showing tribes of Indians within the limits of the United States territory, number of souls, and place of residence of each tribe, made up from the best data in the possession of the Indian Office.”

It stated the number of Sacs and Foxes of the Mississippi as being 1626; their place of residence, Kansas Territory; and the source of information, the annuity payroll for 1854.

The number of Sac and Fox Indians to whom annuities were paid in the second quarter of 1855 was the same as in 1854, namely, 1626, apparently a fixed number being used until the period of the year arrived for a new payroll to be made up. The number for the fourth quarter of 1855 was 1498 and for the second quarter of 1856 it was 1445 and in the fourth quarter of 1856 had diminished to 1382 (Rec. Exhibit A, p. 100). The practice at this and for some time later was to permit dead persons to be enrolled by their friends and relatives for one or more annuity payments (Ann. Rep. Comsr. Ind. Affs. for 1860, p. 110, and for 1861, pp. 60-61). Whether they also drew for persons they knew to be absent does not appear.

On October 1, 1859, the United States made another treaty with the Sacs and Foxes (15 Stats., 467; 2 Kappler, 796), said treaty being proclaimed July 9, 1860, and

expressly stating some members of the tribe were separated from it. This treaty was signed by six persons in behalf of the Sacs and only three in behalf of the Foxes. Prior treaties, as for instance, that of 1842, had been signed by equal numbers from each tribe. By the terms of this Treaty of 1859 the Indians agreed to take land on their reservation in severalty, the full-blood members (Article 2) to receive 80 acres each and the mixed-bloods and half-bloods and those full-blood women who had intermarried with white men (Article 10), 320 acres each.

By Article IV, it was provided that—

“for the purpose of establishing the Sacs and Foxes of the Mississippi comfortably upon the lands to be assigned to them in severalty, or by building them houses and by furnishing them with agricultural implements, stock animals and other necessary aid and facilities for commencing agricultural pursuits under favorable circumstances,”

the lands not divided in severalty should be sold whenever the Secretary of the Interior should think proper.

Articles V, VI, VII and XI of the treaty, read as follows:

Article 5. The Sacs and Foxes of the Mississippi being anxious to relieve themselves from the burden of their present liabilities, and it being essential to their best interests that they should be allowed to commence their new mode of life, free from the embarrassments of debt, it is stipulated and agreed that debts which may be due and owing at the date of the signing and execution hereof, either by the said Confederated Tribes of Sacs and Foxes, or by individual members there-

of, shall be liquidated, and paid out of the fund arising from the sale of their surplus lands, so far as the same shall be found to be just and valid on an examination thereof, to be made by their agent and the Superintendent of Indian Affairs for the central superintendency, subject to revision and correction by the Secretary of the Interior.

Article 6. Should the proceeds of the surplus lands aforesaid prove insufficient to carry out the purposes and stipulations of this agreement, and further aid be, from time to time, requisite to enable the Sacs and Foxes of the Mississippi to sustain themselves successfully in agricultural or other industrial pursuits, such additional means as may be necessary therefor shall be taken from the moneys due and belonging to them under the provisions of former treaties; and so much of said moneys as may be required to furnish them further aid as aforesaid, shall be applied in such manner, under the direction of the Secretary of the Interior, as he shall consider best calculated to improve and promote their welfare. And, in order to render unnecessary any further treaty engagements or arrangements hereafter with the United States, it is hereby agreed and stipulated that the President, with the assent of Congress, shall have full power to modify or change any of the provisions of former treaties with the Sacs and Foxes of the Mississippi in such manner and to whatever extent he may judge to be necessary and expedient for their welfare and best interests.

Article 7. The Sacs and Foxes of the Mississippi, parties to this agreement, are anxious that all the members of their tribe shall participate in the advantages herein provided for respecting their improvement and civilization, and to that end to induce all that are now separated to rejoin and reunite with them. It is therefore agreed that,

as soon as practicable, the Commissioner of Indian Affairs shall cause the necessary proceedings to be adopted to have them notified of this agreement and its advantage, and to induce them to come in and unite with their brethren; and to enable them to do so, and to sustain themselves for a reasonable time thereafter, such assistance shall be provided for them at the expense of the tribe as may be actually necessary for that purpose: *Provided, however,* That those who do not rejoin and permanently reunite themselves with the tribe within one year from the date of the ratification of this treaty shall not be entitled to the benefit of any of its stipulations.

* * * * *

Article 11. The United States also agree to cause to be paid to the tribe any funds that may have heretofore been withheld under the provisions of the fifth article of the treaty of one thousand and eight hundred and forty-two, the same to be expended for their benefit, or paid in money, as the Secretary may direct.

The making of this treaty, proclaimed in 1860, added to the existing unrest among those Sac and Fox Indians remaining on the Kansas Reservation, and in 1862 and each succeeding year the band established in Iowa received accessions of families from the Sac and Fox Kansas Reservation. They were received into and became a part of the Sac and Fox Indians of the Mississippi in Iowa, and in 1867 were given by the United States official recognition by the passage of a Federal statute directing the payment of annuities to them out of the general Sac and Fox of the Mississippi treaty funds and the appointment of an Indian agent for them. Their chief from 1862 until 1881 was Mau-mon-wau-ne-cah (Rec. 121), and upon his death his son became chief. They

were sometimes known as the Fox Indians of the Sac and Fox of the Mississippi (Rec., pp. 55, 86, 90), although a considerably smaller number of Fox Indians continued to reside on the tribal reservation in Kansas and Oklahoma (Rec. 64). Their chief, Mau-mon-wau-ne-cah, had been the chief officially recognized by the United States as the chief of the Fox tribe, and to him as such chief of the Foxes the United States paid the \$500 stipulated in the treaty of 1842 as the sum annually to be paid out of annuity funds to the chiefs, respectively, of the Sac and Fox tribes, this payment of \$500 being made to Mau-mon-wau-ne-cah in 1861, the year he left Kansas and joined his tribesmen in Iowa (Rec. Exhibit A, p. 100). The chief of the Foxes in Iowa, one Ma-sha-na, on arrival of Mau-mon-wau-ne-cah recognized the latter's titular authority and retired in his favor. The number of Sac and Fox Indians in the party headed by Mau-mon-wau-ne-cah when it reached the Iowa lands was 77 (Rec. 72, 114, 115-121). In 1863 there reached Iowa from Kansas, 42 others; in 1864, 13 others; in 1865, 12 others*, and in 1866, 22 others. There is a claim by the Oklahoma branch that some of the Iowa Indians made it a practice to return for annuities each year (Rec. 64), which allegation is denied by appellants and by contemporaneous reports of officials of the state government (Rec. 55) and of the government of the United States (Annual Rep. Comr. Indian Affairs for 1867, pp. 25 and 347). Tribal differences as to the treaty of 1859 and personal ones with the agent were operating causes at least for the removals from Kansas to Iowa in the sixties.

In 1862 the governor of Iowa appointed George L. Davenport to make an official examination into the matter of the "Fox Indians," as he termed them, in Iowa and

in September, 1862, Davenport submitted his report to Gov. Kirkwood. He reported (Rec. 55) the people of Iowa had treated them with great kindness and, so far as here material, said:

"This little band of Fox Indians returned from Kansas Territory eight years ago and brought with them \$800, saved out of their annuities for that year, with which, together with eight horses, they purchased a tract of land which is held in trust for them by the Honorable J. W. Grimes, at that time governor of the State. They were allowed to settle in this county by the inhabitants petitioning the legislature, who passed an act allowing them to do so. * * * They have not received any of their annuities for seven years and which they are justly entitled to, as they are required to take all the members of each family to the agency in Kansas Territory to receive it. The distance being very great, they are not able to do so. They suppose their share of the annuities has been set aside for them. They number 69 men, 65 women and 58 children. They beg your excellency to intercede for them with their Great Father at Washington that their share of the annuities may be paid to them here through your Excellency's hands."

Governor Kirkwood enclosed a copy of the report with a letter to Senator Grimes of Iowa, who on his part transmitted the same to the Commissioner of Indian Affairs (Rec. 55).

Commissioner of Indian Affairs Cooley in 1865 sent \$5,000 out of the regular Sac and Fox annuity treaty annual appropriation to Elijah Sells, Superintendent of Indian Affairs for the Iowa District, to be used for the relief of the Indians in Iowa, writing (Rec. 90):

"In a late interview with a delegation of the Fox Indians of the Confederated Band of Sacs and Foxes of the Mississippi, I was informed that a large portion of their people are in Iowa and in a destitute condition."

Superintendent Sells was directed to proceed to Iowa and ascertain the number of the Fox Indians in that State, the letter further saying:

"There is now before the Department a question as to the extent of the rights of the Fox Indians in Iowa to share in the annuities of the Sacs and Foxes of the Mississippi, pending which it is not desired to apply any more of these funds to their benefit than their wants absolutely require."

At or about this time serious dissensions occurred among the Sacs and Foxes in Kansas and with their agent. Serious charges were made against the agent and against Chief Ke-o-kuck, Che-ko-shuck and others as in a combination to oppress the part of the tribe not in agreement ^{with them} ~~them~~ and Chief Ke-o-kuck and others were charged with growing rich out of the funds of the tribe. The matter was adjusted finally by an agreement that one Mo-ko-ho-ko, a leader of the disaffected element hereafter should be considered as a chief by blood, and that the charges against the agent should be withdrawn; a protest also to be made against division of annuities in favor of members of the tribe in Iowa (Annual Report Commissioner of Indian Affairs for 1866, pp. 269-71).

The Indian agent, H. W. Martin, reported to the Commissioner of Indian Affairs in May, 1866, that he had learned that \$5,000 of the tribal funds "have been

diverted to the use of these lawless Indians" (those in Iowa). He said:

"It is represented to me by the chiefs in council of the Sac and Fox Nation that at the time of the allotment of lands in severalty under the treaty of 1859, this man (Maw-mew-wah-ne-kah) was a chief; that he was opposed to receiving lands in severalty; that he refused to be enrolled for that purpose; that so far as his influence extended he prevented other Indians from being enrolled, and to the full extent of his power hindered and impeded the execution of said treaty. For this contumacious conduct he was, as I have reason to believe, with the approval of the government, removed from his chieftainship by Major Hutchinson, at that time agent for the tribe; and thereupon, with some five or six lodges whom he induced to follow him, he left his people in Kansas and without the consent of the agent or other proper authority, went to Iowa, where he has since continued to reside. The Sacs and Foxes are now and ever have been willing that he and his followers shall reside with them at their reservation and enjoy a full and complete participation in all the benefits resulting from their tribal organization and treaty relations with the United States.

"They are not, however, willing that these benefits shall be extended to them while they refuse to reside with them and persist in living apart from them, for the simple and sole reason that as a people they are willing to observe their treaty stipulations with the Government and conform to the policy adopted by the United States and believed to be conducive to their best interests.

"They believe that any recognition on the part of the Government of this lawless and disaffected faction or any division of their funds for their

relief, or as a contribution to their support while they continue apart from the tribe and refuse obedience to lawful authority as enjoined by treaties with the United States, is only calculated to promote and foster a spirit of disobedience, disaffection, and insubordination among their people, weaken the authority of their agent, encourage the disintegration of the tribes, and is promotive of no good end whatever, either to the people remaining upon the reservation or to those who are thus, in utter disregard of their treaty stipulations, separated from them, and, as they believe, leading a life of vagabondage among the whites, making themselves a nuisance in the neighborhood where they reside, and, so far as in them lies, bringing disrepute and disgust upon the whole Indian race. Whenever, as has frequently been the case, any of these stragglers have returned to the reservation at the time of the enrollment which is made preliminary to an annuity payment, they have invariably been enrolled without the slightest objection so far as I know on the part of the tribe, and have received their full share of the annuities, and there is not today, nor has there ever been, any obstacle or objection in any quarter to their return to the tribe."

On October 7, 1866, Mo-ko-ho-ko and his faction withdrew their charges against Agent Martin; it was agreed he should be considered as a chief by blood and exercise power accordingly, and that Ke-o-kuck and Che-ko-skuck should be recognized as government chiefs.

Under date of October 9, 1866, these facts and the settlement were represented to the Commissioner of Indian Affairs by the officials sent out to investigate Mo-ko-ho-ko's ^{charge}, and he reported that Ke-o-kuck, Che-ko-skuck and Pah-teck-quā, three of the chiefs alleged to be in the op-

pressive combination with the agent, were those who had made advancement toward civilization by living in houses and cultivating land, and that Mo-ko-ho-ko represented the tribesmen who preferred the Indian mode of life. The report of the investigation added:

"As I promised the Indians, I call your attention to the protest of Ke-o-kuck against the division of annuities in favor of members of the tribe in Iowa and the request of all for the early payment of their annuities."

At page 52 of his annual report for 1866, the Commissioner of Indian Affairs himself reported:

"The Sacs and Foxes are all blanket Indians, none of them wearing garments like whites.
* * * A portion of this band unwilling to endure the restraints imposed upon the reservation, have gone to Iowa, where a portion of the annuities of the tribe under directions issued by your predecessor have been expended for their use and benefit. While as a general rule it is deemed very unwise to provide for Indians at any point except their proper reservations, the late Secretary thought this case an exception, inasmuch as the legislature of Iowa had in effect invited the Indians to occupy lands in that State."

Exhibits A and B (Rec., pp. 100, 102) show that Ke-o-kuck and Che-ko-skuck, the latter having succeeded Maw-mew-wah-ne-kah, received \$500 per year each annually as chiefs of the Sacs and Foxes, respectively, from 1862 to the first half of 1870, inclusive, and that from the second half of 1870 until the year 1887, they each received as government chiefs, \$250 annually, and two

others, Ac-qua-ho-ko and Tah-teck-quah, \$250 annually as chiefs.

In the case at bar appellants first claim is for their pro rata according to numbers of the annuities paid out exclusively to appellee Indians from 1855 to 1866, both inclusive.

In November, 1866, the appellant Indians were directed by the Interior Department to return to their Kansas Reservation, and informed they would be paid their annuities upon returning and remaining there. The report of the Commissioner of Indian Affairs for 1867 (p. 25) says:

"Sacs and Foxes in Iowa, in charge of Special Agent Leander Clark, number about 254, and have their residence in Tama County, living pretty much after the manner of the Winnebagoes and Pottawatomies in Wisconsin. They belong to the Sacs and Foxes of the Mississippi, located in Kansas, from whom they separated years ago, not being willing to remain upon the reservation. In January last they received for the first time since the separation their share of the tribal funds. They have purchased 80 acres of timber land, and purpose to buy 100 additional acres adjoining, to cultivate. Believing it best that they should remove, the Department directed in November of last year that the special agency be closed, and the Indians informed they would be paid their portion of the annuities of the tribe upon their returning and remaining upon the reservation of the tribes in Kansas. Congress, however, in March following, directed that they should receive their annuities in Iowa, so long as they remained peaceable, and were permitted to reside there by the government of that State. So far they have given but little or no trouble to the whites; have no school and do not want any."

Congress, by act of March 2, 1867 (14 Stats., 507), upon the action of the Department being called to its attention had provided as follows:

"That the Sacs and Foxes of the Mississippi, now in Tama County, Iowa, shall be paid pro rata, according to their numbers, of the annuities, as long as they are peaceful and have the assent of the government of Iowa to remain in that State."

The second claim of appellants is under this act and is based on the claim the Indian Office paid them a fixed amount annually from 1867 to 1884, both inclusive, although their numerical proportion increased yearly.

In May, 1867, pursuant to the requirements of the act of Congress just quoted, a census was taken of the Indians in both Kansas and Oklahoma.

The Kansas census is set forth as follows:

"Sac and Fox Agency, Kansas,
July 30, 1867.

On the 21st day of May last, the census of the Sac and Foxes was taken with a view to their semi-annual payment, and shows the number of Indians to be as follows:

Men	222
Women	266
Children	227

715

This shows a decrease of 57 during the year. Some have gone to other portions of the tribe in other States, but many have died."

(Report Commissioner of Indian Affairs for 1867, p. 299).

The same report, page 247, with reference to the Iowa census, states:

"On the 31st day of May last the census of the Sac and Fox Indians residing in Iowa, taken with a view to their per capita payment of annuities, shows the whole number of Indians at that time to have been 264, viz: 84 men, 91 women, and 89 children, or 125 males and 139 females. The funds for the third and fourth quarters of 1866, returned to me from the Department for payment to these Indians, were received in the latter part of January last, at a time when the Indians were all absent, scattered over the State in their winter quarters, on their trapping grounds. * * * I made those present on the 8th of April a partial payment, and completed the payment on the first day of June last."

The report further stated:

"That part of the Sac and Fox Indians of the Mississippi who reside in the State of Iowa have existed here for a long time—probably 12 or 15 years—without help or aid from the general government. * * * This payment commenced by me in April and completed on the 1st day of June last—with the exception of a small amount of blankets and clothing furnished the year before—is the first that the Indians under my charge have received from the government since they separated from the balance of the tribe."

The act of March 2, 1867, was speedily followed by a treaty made by the United States with the Sacs and Foxes of the Mississippi on February 18, 1867, and proclaimed October 14, 1868 (15 Stats., 495; 2 Kappler, 951).

By this treaty the Indians ceded all the lands and improvements in their unsold portion of their diminished reservation, and also a full and complete title to the lands and improvements in that portion of their old reservation provided by Article 4 of the Treaty of July 9, 1860. The consideration agreed to be paid by the United States is set forth in Article 3 as follows:

Article 3. The United States agree to pay to the Sac and Fox Indians, parties to this treaty, at the rate of one dollar an acre for the whole of the land ceded in the two preceding sections, being about one hundred and fifty-seven thousand acres of land, less the amount of land set apart for individuals; and further agree to pay the outstanding indebtedness of the said tribe, now represented by scrip issued under the provisions of the previous treaties, and amounting, on the first of November, eighteen hundred and sixty-five, to twenty-six thousand five hundred and seventy-four dollars, besides the interest thereon; out of the proceeds of the sale of lands ceded in this treaty, and the amount herein provided to be paid to said Indians, after deducting such sums as, under the provisions of this treaty, are to be expended for their removal, subsistence, and establishing them in their new country, shall be added to their invested funds, and five per cent. interest paid thereon in the same manner as the interest of their present funds is now paid.

By Article 6 as further consideration of the improvements upon the reservation the United States agreed to give to the Sacs and Foxes for their future home a tract of land in the Indian country south of Kansas and south of the Cherokee lands, to be selected under direction of the Secretary of the Interior, the United States further

agreeing by Article 7 to erect at its cost on their new home in what is now Oklahoma a dwelling house for the agent, a house and shop for a blacksmith, and a dwelling house for a physician, and at the expense of the tribe to build five dwelling houses for the chiefs, to cost in all not more than five thousand dollars.

Articles 9, 10 and 14 of this treaty read as follows:

Article 9. In order to promote the civilization of the tribe, one section of land, convenient to the residence of the agent, shall be selected by said agent, with the approval of the Commissioner of Indian Affairs, and set apart for a manual-labor school; and there shall also be set apart, from the money to be paid to the tribe under this treaty, the sum of ten thousand dollars for the erection of the necessary school buildings and dwelling for teacher, and the annual amount of five thousand dollars, shall be set apart from the income of their funds after the erection of such school buildings, for the support of the school; and after settlement of the tribe upon their new reservation, the sum of five thousand dollars of the income of their funds may be annually used, under the direction of the chiefs, in the support of their national government, out of which last-mentioned amount the sum of five hundred dollars shall be annually paid to each of the chiefs.

Article 10. The United States agree to pay annually, for five years after the removal of the tribe, the sum of fifteen hundred dollars for the support of a physician and purchase of medicines, and also the sum of three hundred and fifty dollars annually for the same time, in order that the tribe may provide itself with tobacco and salt.

Article 14. The Sacs and Foxes, parties to this treaty, agree that the Sacs and Foxes of Missouri, if they shall so elect, with the approval of the Sec-

retary of the Interior, may unite with them and become a part of their people, upon their contributing to the common fund such a portion of their funds as will place them on an equal footing in regard to annuities.

Article 14 never became effective, though under it, as reports of the Indian agents show, a number of Missouri Sacs and Foxes got on the Sac and Fox of the Mississippi rolls and caused the rolls to show increases in numbers for about two years (Rec. 52).

By Article 15 the United States agreed to pay claims of the Sacs and Foxes for stealing of stock from them, the sum of \$16,400, to be expended for the benefit of the tribe upon their new reservation in such manner as the chiefs through their agent should desire. By Article 15 the United States agreed to advance to the tribe \$20,000 or so much thereof as might be necessary to pay the expenses of removal and of subsistence for the first year after removal.

By Article 20 certain special concessions were made to Ke-o-kuck and certain other chiefs, whereby they had a special right of sale of certain lands within the limited area.

Article 21. The Sacs and Foxes of the Mississippi, parties to this agreement, being anxious that all the members of their tribe shall participate in the advantages to be derived from the investment of their national funds, sales of lands, and so forth, it is therefore agreed that, as soon as practicable, the Commissioner of Indian Affairs shall cause the necessary proceedings to be adopted, to have such members of the tribe as may be absent notified of this agreement and its advantages, and to induce them to come in and permanently unite

with their brethren; and that no part of the funds arising from or due the nation under this or previous treaty stipulations shall be paid to any bands or parts of bands who do not permanently reside on the reservation set apart to them by the government in the Indian Territory, as provided in this treaty, except those residing in the State of Iowa; and it is further agreed that all money accruing from this or former treaties, now due or to become due said nation, shall be paid them on their reservation in Kansas; and after their removal, as provided in this treaty, payments shall be made at their agency, on their lands as then located.

As stated, the census taken in May, 1867, in Kansas and Iowa, established 715 and 264 as the numbers of Sacs and Foxes resident in those states. It was taken prior to the proclamation of the treaty of 1867 and before certain Sacs and Foxes of the Missouri, a distinct tribe with separate treaties, had been taken into the Kansas tribes and thereby in 1867, 1868 and 1869 temporarily swelled the Kansas membership. After this census there was therefore apportioned to appellants, \$11,174.66 (Rec. 92) as their proportion of the annuities and that amount was continued as the proportion to which they were entitled until the year 1885. The amount paid to appellee Indians in 1867 is set forth in Exhibit B (Rec. 102), under the head of "Per Capita Annuities," comprising three amounts, namely, \$850, \$12,928.71 and \$16,575, a total of \$30,353.71, making with the amount apportioned to appellants \$41,528.37. On the basis of \$11,174.66 constituting the proportion of appellants with 264 as their census numbers in 1867 and the census number of 715 for appellee Indians, the correct total for both would have been \$41,439.36. It is the contention of ap-

pellants that the apportionment in 1867 was on this basis and that the difference of \$89.01 shown is due to some small matters of administration and bookkeeping. The numbers of appellant Indians steadily increased from 1867 to 1885, but their apportionment of \$11,174.66 continued unchanged. The numbers of appellee Indians steadily decreased from 1867 to 1885, but not their total annuities. It is the contention of appellants that under the act of 1867 the United States was bound to make annual "rests" and apportion the annuities each year on the pro rata basis of numbers and that such annual "rests" would have given them a considerably larger amount than they received under the plan devised of one "rest" from 1867 to 1884, both inclusive, and that as appellee Indians were dying out in that period the plan gave them a considerable over-payment on the basis of their numbers. The annuity pay rolls (Exhibit B, p. 102), place the number of appellee Indians paid in 1867 at 779 in one quarter and 800 the next quarter, and the number paid in 1884 at 445 (p. 105). The annuity pay rolls (Exhibit C, p. 111) place the number of appellant Indians paid in 1867 at 264 in the second and 262 in the third quarter and the number paid in 1884 at 375 in the fourth quarter. This claim is set forth at length later. Appellants objected to the annuities apportioned them and refused to receive the same as not their pro rata proportion on the basis of comparative numbers.

In the Indian Appropriation Act of May 17, 1882 (22 Stats., 77), after appropriations under head of "Sacs and Foxes of the Mississippi" aggregating \$51,000 for permanent annuities, there was added:

"Provided, That the sum of one thousand five hundred dollars of this amount shall be used for

the pay of a physician and for purchase of medicine; in all fifty-one thousand dollars: And provided further, That hereafter the Sacs and Foxes of Iowa shall have apportioned to them from appropriations for fulfilling the stipulations of said treaties no greater sum thereof than that heretofore set apart for them."

This is claimed by appellees to have been a legislative approval of prior distributions. The matter was presented to Congress and in the Indian Appropriation Act of July 4, 1884 (23 Stats., 85), it was enacted:

"Provided, That hereafter the Sacs and Foxes of Iowa shall have apportioned to them, from appropriations for fulfilling the stipulations of said treaties, their per capita proportion of the amount appropriated in this act, subject to provisions of treaties with said tribes; but this shall apply only to the Sacs and Foxes now in Iowa: And provided further, That this shall apply only to original Sacs and Foxes now in Iowa to be ascertained by the Secretary of the Interior."

A new census thereupon was taken of the Indians and it was determined that the total numbers of Indians entitled in both Kansas and Iowa was 830, of which 317 were appellant and 513 appellee Indians. That basis thereafter was continued, and with the exception of two years, continued down to the present time as the basis of apportionment between the two sets of Indians. The annuity payrolls of appellee Indians (Exhibit B, Rec. 105) show 532 Indians were paid annuities in the second and 535 in the third quarter of 1899, and the annuity payrolls of appellant Indians (Exhibit C, Rec. 113) show 398 of them were paid annuities in the first quarter of 1899 and 394 in the third quarter of that year. The

same annuity rolls of appellee Indians brought down to the year 1907 (Exhibit B-2, Rec. 156) show the number receiving annuities were 521 and similar rolls of appellant Indians for 1907 (Exhibit C 2) show 349 of them were paid annuities in 1907. It is the contention of appellants annual "rests" should have prevailed under the Act of 1884 and that fixed proportions have worked to their financial and illegal injury. They claim the differences on the basis of the annuity payrolls as the best evidence of numbers entitled to share in tribal treaty funds.

Appellants long were dissatisfied with their treatment by the Indian Office and finally set forth their grievances in a memorial to Congress which resulted in the Indian Appropriation Act March 2, 1895 (28 Stats., 903), containing the following:

"That the Secretary of the Interior be, and he is hereby, directed to examine the claim of the Sac and Fox Indians of Mississippi, now residing in the State of Iowa, as set forth in their memorial presented to Congress (Senate Miscellaneous Document Numbered Forty-eight, Fifty-third Congress, third session), for the payment of annuities and other sums from the tribal funds of said Sac and Fox Indians of Mississippi and any and all claims of that portion of the tribe residing in Iowa, and to ascertain whether, under any treaties or Acts of Congress, any amount is justly due them as a portion of said tribe from those of said tribe now in Oklahoma by reason of any unequal distribution of tribal annuities, land funds, or funds from other sources, and, if so, how much, giving full opportunity to all parties in interest to be heard, and to report his conclusions to Congress at the next assembling thereof."

On March 12, 1896, Hoke Smith, Secretary of the Interior, reported his conclusions to Congress as directed (Rec. 124-140). He reported nothing due to appellants from 1855 to 1867 on the ground, they had forfeited their right to annuities (Rec. 140) by "abandoning their reservation in defiance of treaty obligations and without the consent of the United States Government." He held also that there was nothing due on the claim for unjust apportionment of annuities from 1867 to 1894, but held that \$42,893.25 was due appellants as their share of proceeds of lands ceded under the Treaty of 1867 and should be placed on the books of the Treasury to their credit. This was done by Congress. The opinion of this court in the New York Indian case, 170 U. S., 1, on the subject of forfeiture of property rights by Indians for not removing or remaining on their reservation, was rendered April 11, 1898. In 1896, immediately upon Secretary Smith's adverse findings, in large part, appellants, through their attorneys, protested the same were erroneous.

In the Indian Appropriation Act of May 31, 1900 (31 Stats., 245), it was enacted:

"Provided, That the Secretary of the Interior is directed to pay to Push-e-ten-neke-que, head chief of the Sac and Fox of the Mississippi Indians, located in the State of Iowa, five hundred dollars per annum during the remainder of his natural life, beginning with and including the fiscal year 1900, in accordance with the terms of article four of the treaty proclaimed March twenty-third, eighteen hundred and forty-three."

In the case at bar the fourth claim of appellants is for \$500 per year from 1862 to 1900 on the ground that

under the treaty referred to their head chief, as chief of the Foxes, was entitled to this amount annually for purposes of use among his people, and that the same had not been paid their chief but had been diverted instead to chiefs in Kansas.

On June 5, 1900, Congress called on the Secretary of the Treasury for information and accounts as to apportionment of tribal annuities between the appellant and appellee Indians and the same was furnished in December, 1901, and printed as a Congressional document (Rec. 94-113), a letter from Secretary of the Interior Hitchcock (Rec. 114), with certain affidavits also being incorporated in the printed document (114-123).

In June, 1906, Congress passed an act transferring slightly more than \$100,000 of tribal funds from the credit of the Sac and Fox of the Mississippi in Kansas, to the credit of appellants, a compromise amount, the Doliver bill of January 15, 1904, calling for \$252,033.33. Acting Commissioner of Indian Affairs Larrabee reported to President Roosevelt strongly against the bill (Rec. 57) and the next day the President vetoed the bill (Rec. 23), stating that he had ordered an immediate and thorough investigation of the claims and that "after the report of this investigation has reached me I shall be prepared to give my assent to any bill which shall do justice both to the Indians in Iowa and the Indians in Oklahoma."

The last of December Commissioner of Indian Affairs Leupp reported to the President in response to the instructions referred to above (Rec. 75), recommending a judicial as distinguished from a legislative or executive settlement of the controversy. He said in part:

"I do not consider myself a competent arbi-

trator in the present situation for two reasons: First, my natural tendency, other things being equal, would be to preserve the traditions of this Office in regard to any case presented to it. The attitude of the Office has uniformly been adverse to the claims of the Iowa band of Sac and Fox Indians. * * * In the second place * * * I shall find myself called upon to decide whether a certain sum of money should be given up by one band of Indians who have honestly striven to carry out the policy and wishes of the Government, and to do what the successive Commissioners of Indian Affairs and Secretaries of the Interior have asked them to do, and pay it over to another band of Indians who have defied every wish of the Government and cast contempt upon its policy."

Thereupon the present jurisdictional act was passed. The first three claims are among those included in the document mentioned in the act. The fourth, for \$500 per year chief money, was not, and the fifth claim, for a pro rata share of the proceeds arising from land disposed of under the Treaty of 1859 is brought under the jurisdictional act and upon the theory that it was not just and equitable land in which appellants had an undivided interest should be sold and the proceeds devoted to the payment of tribal and individual debts of the Indians in Kansas, the treaty showing expressly some of those affected, the number including appellants, were absent.

Assignments of Error.

1. That the court below erred in dismissing appellants' (claimant below) petition and holding that appellant was entitled to recover from neither of appellees (defendants below).

2. That the court below erred in not holding that appellant was entitled to recover from each and both of appellees on each and all of the five claims set forth in the petition and prayer of appellants' bill.

3. That the court below erred in holding, in effect, that the claims of appellants were *res adjudicata* by reason of the adverse findings of the Secretary of the Interior in 1895, notwithstanding the instant jurisdictional act.

4. That the court below erred in holding that appellants had no vested interest in tribal funds and tribal lands and in tribal annuities.

5. That the court below erred in holding that appellants had forfeited or abandoned all right to annuities between 1855 and 1866, both inclusive, by absenting themselves from the reservation provided for them in Kansas.

6. That the court below erred in holding, notwithstanding the instant jurisdictional act, and notwithstanding the evidence in the record of the communal character of appellant from 1855 to the present day, that appellants have and from 1855 to 1866 had no legal entity.

7. That the court below erred in holding that notwithstanding the jurisdictional act and the stipulation between claimants and defendant Indians there was no competent evidence of at least the minimum numbers of appellants from 1855 to 1866, and in so finding in Finding of Fact No. 3, and in holding Congress, and the parties could not make rules of evidence for the court.

8. That the court below erred in not finding that the minimum numbers of appellants from 1855 to 1866, both inclusive, and the maximum number of the appellee Indians was established by competent evidence, and that

appellant was entitled to recover on the basis of the ratio between such numbers and the total annuities paid to appellee Indians from 1855 to 1866, both inclusive.

9. That the court below erred in Finding of Fact No. 3, in finding that the names, sex and ages of those Indians who left the Kansas reservation between 1855 and 1866 and returned to Iowa was not shown by any competent evidence, so much of said finding as relates to names, sex and ages being incompetent, irrelevant and immaterial.

10. That the court below erred in Finding of Fact No. 3 in finding that certain members of the appellant body left the reservation in Kansas in 1855, the record showing they left in 1854.

11. That the court below erred in not finding as a fact in Finding No. 5 that appellees both knew or were chargeable with notice in 1855 and 1856 that appellant Indians had removed to their old Iowa home in 1855, and in not finding that appellees had actual and express knowledge of such facts in 1859 and 1863.

12. That the court below erred in holding in its opinion, in direct conflict with its Finding of Fact No. 3, that a number of appellant Indians who went to Iowa between 1855 and 1856 returned and drew annuities in Kansas between those years, the clear preponderance of the evidence showing that none of appellant Indians after leaving Kansas thereafter returned or drew annuities.

13. That the court below erred in holding in its opinion and in its Finding of Fact No. 4, that those Indians who went to Tama County, Iowa, after July 15, 1856, and resided there, did so in violation of the Act of the Iowa Legislature, said finding being immaterial and irrelevant and the opinion erroneous as matter of law.

14. That the court below erred in holding that appellant was entitled to no allowance on account of failure to receive its pro rata share according to numbers of the annuities from 1867 to 1884.

15. That the court below erred in holding in its opinion that the Act of July 4, 1884, was a legislative approval of the annuity payments made to appellants from 1867 to 1884, and that the Secretary of the Interior, in effect, had discretionary powers in apportioning the annuities between the Iowa and Kansas Sac and Fox of the Mississippi.

16. That the court below erred in holding that the numbers of appellant and appellee Indians from 1867 to 1884 is not shown and that it does not appear fixed numbers were used as a basis of apportionment, the record showing the numbers of both appellant and appellee Indians by competent evidence, and that this appellant, for the period named, received less than its proportion of the total distributions of annuities.

17. That the court below erred in holding that appellant was entitled to no allowance on account of failure to receive its pro rata share according to numbers of the annuities from 1884 to date.

18. That the court below erred in its Finding of Fact No. 11 in finding that the competent evidence presented to the court does not show what increase, if any, or what decrease, if any, there was in the respective tribes during said period, the numbers of each tribe, those in Kansas and those in Iowa, being shown by the best and most competent evidence possible, and indeed by almost conclusive evidence, namely, the annuity payrolls showing the numbers of Indians of each tribe to whom annuities were regularly paid.

19. That the court below erred in holding appellant was entitled to no allowance on its fourth claim, that of \$500 per year for thirty-seven years for its principal chief.

20. That the court below erred in holding appellant was entitled to no allowance on its fifth claim, for its fair, proportionate share, according to its numbers of the proceeds of land sold under the Treaty of 1859.

Argument.

The first question that counsel for appellants anticipate may be raised by appellees is that appellants are concluded by the findings of fact by the Court of Claims. The whole case we submit is *res integra* in this court and the findings of fact below not conclusive and of no greater potency than that they place on appellants the burden of showing error below. Appellants' position in this matter is grounded on two propositions: first, that the case at bar is one of equity jurisdiction conferred by special act of Congress and the duty thereby is devolved on this court to review the facts and the law as in other equity cases; second, that the findings of fact by the court complained of are erroneous because of error of law below in holding that neither Congress, nor the parties by stipulation, can make rules of evidence for the court for the particular case. The correctness of the first proposition the Court of Claims recognized when, on motion by appellants, supported by the authorities about to be cited, the court, contrary to its usual practice, transmitted the full record to this court, exclusive of its original findings and appellants' motion for review and rehearing.

The jurisdictional act (Trans. Rec. p. 34) conferred on the Court of Claims and, upon appeal, on this court "full legal and equitable jurisdiction, without regard to lapse of time, to hear, determine, and adjudicate, as justice and equity shall require" all claims of appellants against the other Indians and the United States arising out of certain described matters.

In *Old Settlers or Western Cherokee Indians v. The United States*, 148 U. S., 426, this court mandamused the Court of Claims to transmit all the evidence below and held:

"The rule in regard to findings of fact by the Court of Claims has no reference to a case of equity jurisdiction conferred in a special case by special act; in such a case, where an appeal lies and is taken, this court must review the facts and the law as in other cases in equity appealed from other courts."

See also *Harvey v. The United States*, 105 U. S., 671.

The findings of fact complained of, namely, the findings by the court below that the numbers of appellant Indians and of defendant Indians from 1855 to 1866, both inclusive, and from 1867 to date, are not shown by competent evidence are in reality erroneous findings based on a misapprehension of law and as such would be in any case reviewable. The mistake in these findings is due to the erroneous assumption by the court that there was an invasion of its prestige and prerogative when Congress, by the jurisdictional act, provided that Government reports printed as Congressional documents "shall be received as evidence in said suit, so far as the facts may be concerned, and shall be given such weight as the court may determine for them," and when counsel

for the appellant and appellee Indians, each having affidavits contained in a Congressional document, stipulated (Rec. 87) "that the affidavits below may be taken and received by the Court of Claims in the same manner and be given the same effect as if they were depositions regularly taken under the rules of the court." These affidavits and the Congressional documents contained substantially uncontroverted evidence of the minimum numbers of appellant and maximum number of appellee Indians on which the court could fix the ratio for ascertainment of the money rights of appellant and the amount to which it was entitled to a decree, had the court found, as it did not, but as it should, that appellant, in justice and equity, was entitled to recovery in some amount. The court, however, refused to receive the statements of facts contained in the affidavits or the reports of officials embodied in the Congressional documents, in its findings (Rec. p. 35, Finding 3) declaring there was no "competent evidence" of numbers and in its opinion (Rec. 43) holding as a conclusion of law that the affidavits "cannot properly be admitted as testimony" and ignoring the reports of State and Federal officials. The merits of the position of the court below will be discussed later, the present purpose being to show that the findings of fact involved are not controlled by the usual principles applicable on appeal as to "facts" found by a lower tribunal.

THE PRESENT CASE IS NOT RES JUDICATA BY REASON OF THE REPORT OF THE SECRETARY OF THE INTERIOR UNDER THE ACT OF 1895. THE JURISDICTIONAL ACT CONFERRED FULL AUTHORITY ON THE COURTS TO ADJUST THE DISPUTE "AS JUSTICE AND EQUITY," ON LEGAL AND EQUITABLE PRINCIPLES APPLIED TO THE TREATIES, STATUTES AND FACTS REQUIRE, REGARDLESS OF PRIOR DEPARTMENTAL CONSIDERATION. FURTHERMORE, THE ACT OF 1895 AUTHORIZED THE SECRETARY OF THE INTERIOR SIMPLY TO REPORT CONCLUSIONS AND EVENTUALLY THE LAW-MAKING POWER SENT THE ENTIRE DISPUTE TO JUDICIAL DETERMINATION FREE FROM TECHNICALITIES AFTER THE PRESIDENT VETOED ITS ACTION DIRECTING PAYMENT OF A NAMED AMOUNT TO APPELLANTS.

It was contended by appellees below, and in effect, the Court of Claims seems to have held in indefinite fashion that appellants' rights were concluded by reason of the fact that under the Act of March 2, 1905 (28 Stats., 903), the Secretary of the Interior had reported adversely on the claim of appellants to their share of tribal annuities from 1855 to 1866 inclusive, and for more than was paid them of tribal annuities from 1867 to 1895, and had found them entitled to \$42,893.25 on account of land sales under the Treaty of 1867 (Rec. 124-140), which amount Congress credited to the account of appellants, who promptly protested against the

Secretary's conclusions (Rec. 141-150), and the matter continued under Congressional consideration from that time, as it had for many years prior to 1895, until in June, 1906, Congress passed an act awarding to appellants \$100,167.10 (H. R. 10133, Con. Rec., May 7, 1906, p. 64-80) in full compromise and settlement of all their claims, which act the President, on advice of the Commissioner of Indian Affairs, vetoed (Rec. 22), whereupon in accordance with suggestions contained in the veto message the present jurisdictional act was enacted into law, in order that there might be "a full and fair hearing" and judgment rendered "according to the legal and equitable rights of the two parties litigant," as proposed by the Commissioner of Indian Affairs (Rec. 75), the entire law-making power by reason of the friction engendered being fully advised of the history of the dispute. The entire intention of the law-making body obviously would be wholly frustrated if the dispute were treated as *res adjudicata*; assignment of error No. 3.

The case of the United States v. Old Settlers or Western Cherokees, 148 U. S., 427, is ample authority to the contrary. In that case a settlement with the Western Cherokees had been made in 1850 under an Act of Congress of 1848 and a report made thereon to Congress, the settlement stating the amount paid should be in full payment of all demands of the "Old Settlers."

In 1884 the matter was referred by a Senate Committee to the Court of Claims for findings of fact, which findings were by the court transmitted to Congress, which in 1889 passed a Jurisdictional Act referring the matter to the Court of Claims for adjudication.

This court, in 148 U. S., 474, passing on a contention then made identical with the contention of the defendants in the instant case, said:

"We are confronted by the objection strongly urged on behalf of the United States that by the terms of the Jurisdictional Act, if it be found that 'the said Indians have heretofore adjusted and settled their said claims with the United States' such adjustment and settlement must be treated as conclusive."

The court then cited decisions of its own, referred to in the brief of the United States below in the present case, to the effect that where in professed pursuance of treaties, statutes had conferred valuable benefits upon the Indians which the latter had accepted, "they partook of the nature of agreements, the acceptance of the benefit, coupled with the condition, implying an assent on the part of the recipient unless that implication is rebutted by other and sufficient circumstances."

But, the court continuing, said :

"But we think, under all the circumstances disclosed here, that Congress being convinced that a mistake had probably been made in the accounting in a matter which the Indians from the first had called attention to, and desirous, as being the stronger party to the controversy, that that superior justice, which looks only to the substance of the right, should be done in the premises, voluntarily waived any reliance upon lapse of time or laches, and, after attempts on its own part to arrive at a satisfactory result, determined to obtain a judicial interpretation of the treaties and laws bearing upon the subject, and to be bound by judicial decision in respect of the conclusions flowing therefrom, and arrived at upon equitable principles; and that the Jurisdictional Act passed in effectuation of such intention left it open to the court to readjust the amount, notwithstanding the claim might have been thereto-

fore settled. In other words, if the adjustment and settlement were found to have been made upon an erroneous interpretation, which led to an obvious mistake, then Congress designed that the mistake should be corrected. We therefore proceed to examine the account in question in accordance with what we believe to have been the intention of Congress in the passage of this act."

This, we respectfully submit, is precisely the situation in the case at bar. The claimants from 1856 on have asserted that they were lawfully entitled to the money now claimed; the Congress of the United States referred the matter to an executive officer, the Secretary of the Interior, to examine and report conclusions; the Secretary did examine and report, finding a certain amount due claimants on land sales or cession account, but that annuities had been forfeited by claimants leaving their reservation and returning to Iowa, this holding being a short time prior to the contrary holding of this court in the controlling New York Indians case, 170 U. S., 1; action was taken thereupon whereby a certain sum of money was paid to the Indians upon one small matter, certain land sales, and the Indians constantly protested against the Secretary's view of the law and certain of his findings. Thereupon Congress by a broad, general act, referred the matter to this court with jurisdiction to render judgment upon legal and equitable lines.

For this court to hold the case *res adjudicata* would be in derogation of the authority of Congress, which, with all the facts and its own and the Executive action on the claims before it conferred full legal and equitable jurisdiction, unbarred by lapse of time, on the courts to "hear, determine and adjudicate" the claims "as justice and equity shall require."

See also Markham vs. U.S. 44 Ct. Cl. 519.

THE CLAIM FOR ANNUITIES FORFEITED
FROM 1855 TO 1867, BOTH INCLUSIVE,
FOR NON-RESIDENCE IN KANSAS.

The court having full jurisdiction of the entire case it is then brought to consideration of the first claim of appellants, which is for their pro rata share of annuities from 1855 to 1867, both inclusive, the evidence being clear that no annuities were paid the Fox Indians who returned from Kansas to Iowa between 1855 and 1867. The court below found they had forfeited or abandoned their right to annuities by leaving their reservation in Kansas and returning to Iowa without the consent of their agent, and that if this were not so they were and are not a legal entity entitled to recover without individual proof of identity as or descent from individual members of the Sac and Fox tribe from 1855 to 1867 who had not been individually paid their royalties, and that they were barred from recovery for want of this individual proof; assignments of error 4 to 9 inclusive.

THE PRESENT SUIT IS NOT A CASE OF A FEW STRAGGLING WANDERERS WHO MIGHT HAVE BEEN PRESUMED DEAD WHEN NOT APPEARING FOR ANNUITIES. IT IS A CASE OF THE MIGRATION OF LARGE BANDS WHOSE ABSENCE SHOULD HAVE OCCASIONED INQUIRY BY THEIR TRUSTEE AND WHOSE JOURNEY TO THEIR OLD HOME NECESSARILY MUST HAVE BEEN KNOWN TO THE APPELLEE INDIANS. A CASE WHERE THE UNITED STATES HAD EXPRESS NOTICE IN SEASON TO RECOUP ITSELF FROM THOSE WHO WERE OVERPAID THE SHARES DUE APPELLANTS AND PERSISTED, WITH KNOWLEDGE, IN ITS ERROR OF LAW THAT ABANDONMENT OF THEIR KANSAS RESERVATION FORFEITED APPELLANTS' ANNUITY RIGHTS.

The Court of Claims, in its opinion, has announced the theory of law (Rec. 43) that it has been the custom and policy of the Government not to pay to or reserve annuities for Indians who are absent from their reservation without permission, that the treaties made did not embrace the personal rights of individual Indians, that it was the duty of appellant Indians to have returned to the agency in Kansas and that their absence worked a forfeiture of their right to share in the tribal funds during the period of their absence and had been so held by the Court of Claims in the *Journeycake* case and by this court in the last *Pam-to-pee* case (187 U. S., 371). We expect later to show neither of these cases is of weight as authority in the current suit.

Granting for the present that an individual Indian may be held to lose, or rather that the United States may not be liable to, or as matter of policy, may not be willing in general to acknowledge liability to and any remedy in an individual Indian who separates from the tribe and by long absence causes the belief to be entertained that he either is dead or has wholly ceased interest in or claim to tribal rights or annuities so that an equitable situation has arisen wherein the sovereign, as matter of policy, deems itself justified in denying redress to the individual from either the United States or the tribe which has in extra payment benefitted to the extent of the share of the absent individual Indian, has that application to the instant case? Here the United States, by the Jurisdictional Act, has afforded the remedy which usually is without the power of the courts of equity where the sovereign is concerned even though it occupy the character of trustee, vide Perry on Trusts, Secs. 40 and 41. The appellants did not separate as individuals. They did not afford reason for indulgence of the belief they were dead. They left because of smallpox and drouth. They left in families. They were a large, if not a major element, even in 1855, of the Fox Tribe. The reports of the Indian Agent of 1853 and 1854 heretofore cited that the Indians, by reason of smallpox, had widely scattered, was notice to the trustee that a condition had arisen whereby it could not rely in making payments on the presumption that those who applied for annuities were all the Indians entitled thereto. As trustee it was the duty of the United States to have made inquiry when it ascertained there were appalling decreases in the tribal rolls. The fact there were 144 that arrived in Iowa, only about one-third, roughly, being children, shows

whole families in numbers had not been paid their annuities. The duty of inquiry was cast upon the United States and inquiry could not have failed, we submit, to have developed that the band in Iowa had returned to their former reservation in Iowa because of dissatisfaction with conditions in their new and so-called permanent home in Kansas. And, unless the treaties or the law, as counsel submits cannot be contended to be correct in the light of the New York Indian case, 170 U. S., 1, made absence from the reservation work a forfeiture of annuities, it was the duty of the United States to have retained sufficient annuities to have provided for the appellant band, and then have paid them the same at their Iowa abode or have taken the steps lawfully necessary to a forfeiture of their annuities. Furthermore, in 1856, as seen, the Iowa Legislature passed an act of license to the appellant Indians to remain in Tama County and declaratory of the claim of the Indians to their annuities. That act evidences that appellant Indians had no intention to renounce or abandon their right to share in annuities. No valid claim of abandonment therefore can be asserted against them. That act was notice to the United States. It was a State statute of which the United States and all Federal officials must take judicial notice, without proof, it being a public act (Greenleaf on Evidence, 15th Ed., Secs. 5 (notes) and 490; *Owings v. Hall*, 9 Pet. (U. S.), 624). Even if the doctrine of laches applied, as this court has held it does not, to Indians the period of time involved in any aspect of this case is too brief, and the Indians on arrival in Iowa did what was reasonably to be expected of them, in their state, that of blanket Indians, they reported to the Governor of the State. That official was

John Chambers, the identical person who, as Governor of the Territory of Iowa, was ex-officio Superintendent of Indian Affairs, and who, as such, had, as the representative of the United States, negotiated with them the Treaty of 1842 in accordance with whose provisions they had removed from Iowa to Kansas.

In 1859 the United States acknowledged by the treaty it made with appellee Indians that it had notice of the fact tribal members were absent, inviting them to reunite with the tribes, and also, counsel think it may be fairly said, admitted something was due appellants before they should be debarred of tribal annuities and benefits by providing for notification to those separated to return and assistance to them, with one year allowed within which to rejoin the tribes on their reservation. This notice, a prerequisite to forfeiture, vide *New York Indians v. United States*, 170 U. S., never was given to appellants until November, 1866, when it seems to have figured in settling serious dissensions in the tribe and charges against the agent, and then in March, 1867, Congress took a hand and gave appellants express permission to remain where they were.

January 13, 1863, the United States received, and then almost immediately ignored, direct, express notice of the fact appellants were at their old home in Iowa (Rec. 53), that they had been there for some years and without receipt of annuities, but that they claimed them and supposed they were set aside for them, for on the day named Senator Grimes enclosed the Davenport report in a letter to the Commissioner of Indian Affairs. Nothing was done with reference to the matter. At this time the trustee had still abundant opportunity to remedy the illegal and wrongful acts done appellants and to withhold

Indians

funds from appellee ^{who} for that purpose. The view of the Indian Office its later attitude shows, as does reports of Indian Agents, that appellants had forfeited all rights and should be treated accordingly. The mistake was one of law and not of ignorance of facts as to appellant Indians existence and whereabouts. The question of law was still pending before Commissioner Cooley in November, 1865 (Rec. 90), and later the Interior Department and Indian officials acted on the doctrine of forfeiture. The United States has submitted the case to this court in its superior justice and position, affording a remedy if liable on legal or equitable principles. It occupied the highest of trust relationships, that of custodian of funds in trust for a dependent people, for distribution to each one of those people per capita (Treaties and Annuity Act of 1852 heretofore cited). It stands to the Indians in the position, well stated in *Chickasaw Nation v. the United States*, 22 Ct. Cls. 248, of "super-vision and care more detailed in definition, more important in essence, than that of trustee to *cestui que* trust, or even that of guardian to ward; in effect, which resembles the relation of parent to child." As trustee it was liable, unless there was a forfeiture, if it paid some more than they were entitled and was not absolved because it did disburse the whole funds entrusted to it (Ency. Law, 2d Ed., Vol. 28, p. 1067).

We come then to the question whether the position of the Interior Department and of the Court of Claims that appellant Indians forfeited their annuity rights by going to and remaining in Iowa be correct.

THE TREATIES CONTAIN NO EXPRESS PROVISIONS OF FORFEITURE. THE TREATY OF 1859 ~~1855~~, IF CAPABLE OF A FORFEITURE CONSTRUCTION, PROVIDED CERTAIN PREREQUISITE CONDITIONS, NOTICE AND ASSISTANCE, BEFORE ANNUITIES COULD BE FORFEITED. THOSE CONDITIONS WERE NOT COMPLIED WITH. PROOF OF STRICT COMPLIANCE IS CAST UPON APPELLEES.

The Court of Claims and Secretary of the Interior Smith, we submit, are in error in holding in their opinions that appellants forfeited their annuities from 1855 to 1867 by remaining in Iowa. We believe the error of the Honorable Secretary of the Interior in holding there was a forfeiture was due to the date of reference of the matter to him for his report. He decided prior to the controlling opinion in the matter of the Supreme Court of the United States in the New York Indian case, but subsequent to the reversed decision rendered in that case by the Court of Claims.

The several treaties whereunder the present claimants assert their claim were made between the United States and the confederated tribes of the Sac and Fox of the Mississippi in 1804, 1832, 1837 and 1842. These treaties provided certain perpetual annuities aggregating \$51,000 annually, to the confederated tribes, of which the claimants are admittedly a part. None of these treaties provided for forfeiture of annuities in case any band or bands should separate from the main band and refuse to live upon the reservation provided for them by the United States. Whether or not, in view of the fact that the treaties did not provide forfeiture, it would be com-

petent for the United States by statute to have forfeited the annuities of such bands as did not continue to reside upon the reservation provided for them need not be considered. The fact is that there is no statute of forfeiture. That a Departmental official cannot lawfully declare a forfeiture was decided by the late Justice Brewer in *Richardville v. Thorp*, 28 Fed., 52.

The Act approved August 30, 1852 (10 Stats., 56), provided that appropriations made for the benefit of any Indian tribe or part of a tribe "shall in every case be paid directly to the Indian or Indians themselves to whom it shall be due, or to the tribe or part of the tribe per capita unless the imperious interests of the Indian or Indians or some treaty stipulation shall require the payment to be made otherwise under the direction of the President."

The President of the United States did not from 1852 to 1859, or for that matter at any time thereafter, declare that "the imperious interests of the Indians," nor did any treaty stipulation require, that payment should be made otherwise than per capita to the Sac and Fox Indians of the Mississippi or that they should not be made to them except upon their reservation.

No presumption of any such action by the President under the Act of 1852 as to the Sacs and Foxes, can be indulged because this would be an affirmative, substantive act which must be proved as a fact (*U. S. v. Carr*, 132 U. S., 645; *Saboriego v. Maverick*, 124 U. S., 262).

The Treaty of 1859, by Article 7, invited those separated from the tribe to reunite with it in order that they might enjoy the advantages of that treaty. It provided for notification and assistance to the absentees in returning and in default of returning within one year, under

a strict construction as is the rule where forfeitures are to be enforced, barred those not returning from enjoying the benefits of the Treaty of 1859. That treaty provided no annuities and hence should be construed as not applicable to the present claim. But even if a forfeiture of annuities could have resulted from notification and assistance to appellant Indians, the record shows no notification and assistance to appellants. The burden of proof was on appellees.

The case of the New York Indians v. U. S., *supra*, counsel respectfully insists is absolutely controlling on this contention that appellants forfeited their annuities by removing to and remaining in Kansas. In that case the court held, reversing the Court of Claims, that there had been no forfeiture and that before a forfeiture of rights could take place "a judicial inquiry should be instituted or, in the technical language of the common law, office found, or its equivalent. * * * That legislation to be sufficient should be direct, positive and free from all doubt or ambiguity."

Further, said the court, even if it were conceded that the rights of the Indians

"were subject to forfeiture by executive action, it is by no means certain that the contingency ever happened which authorized such forfeiture; or if a forfeiture did result, it was not waived by the subsequent action of Congress. A condition when relied upon to work a forfeiture is construed with great strictness."

The question of appellants' rights in annuities was pending before the Commissioner of Indian Affairs, as noted, in 1865. It was not until November, 1866, the Executive branch of the Government notified

the Indians to remove from Iowa to Kansas and that notification was nullified before it could have any binding effect by the law-making branch by the Act of March 2, 1867, giving appellants the right to remain in Iowa.

The several cases in the Cherokee, Choctaw and Chickasaw Indian Nations and the second Pam-to-pee case, on which appellees below and the Court of Claims rely, have no proper application to the case at bar. The Five Civilized Tribes cases are controlled by the authority expressly conferred by treaty on those tribes to bar from tribal rights by their own legislation persons continuing absent from the tribe, such authority being absolutely requisite to enable those tribes to have means whereby to continue to hold title to the lands granted them, and the second Pam-to-pee case turning not on any question of forfeiture.

In the cases cited from the Cherokee Nation will be found upon examination of the cases that as early as 1817 the Cherokee Nation had a law which specifically provided that any person removing himself or herself from the Cherokee Nation should forfeit and lose all rights in the common property, land or funds of the nation, and that this again was expressly provided for in the Cherokee Constitution adopted in the late '30s. In the cases decided against the claimants it appears affirmatively that the claimant Indians as a matter of fact violated these terms and conditions of the community in which they lived and thereby ceased under the laws of their own community to be citizens of the more or less civilized Indian nation of which they were members, and which was under the suzerainty of the United States, but at liberty to make its own laws, except where the same were in conflict with the Constitution and laws of

the United States. To have decided these cases in favor of the claimants who were claiming certain rights, notwithstanding they had expatriated themselves, would have required the court to hold that the Cherokee Nation was not competent to make laws for the government and disposition of the property of the nation, and further that it was not competent to do this although the United States, by its treaties made in 1835 and 1846, had expressly recognized the right of the Cherokee Nation to make its own laws.

These same remarks will apply to the cases cited arising out of the claims of Cherokee Freedmen and of the Delawares and Shawnees.

In the case of *Chickasaw Nation v. The United States*, 22 Court of Claims, the finding is based upon the express ground that by treaty it had been provided that certain officials of the Chickasaw Nation should be the guardians of certain Chickasaw orphans and that the United States in the event it should pay the money to these trustees for the Indian orphans named in the treaty at the request of the Indians themselves, should not be further liable over in the event that the Indian orphans did not receive the money. This was the express point of the decision of the court for, as stated at page 264, "their fraud (that of the persons the Indian Nation set up to protect the rights of the orphans), mistake or laches cannot raise any obligation in the United States, the party deceived or misled by them, as they acted as the agents of the Indians, not as the agents of the Government."

In the second *Pam-to-pee* case, 187 U. S., 378, the facts were that there had been an earlier suit by two sets of *Pottawatomie* Indians, neither set having a tribal

organization, in which the court had passed a decree in favor of the claimants as a generic body, but for lack of any better mode of enforcement of the decree had by its decree directed the executive officers to distribute the fund created by its judgment among those coming within the description of Pottawatomie Indian claimants to the fund.

Two years were taken in the distribution, and the attorneys representing the claimants had full opportunity for hearing by the Interior Department as to the proper mode of distribution under the court's decree. Subsequent to the final distribution of the money certain of the claimants through one of their original attorneys, notwithstanding the fund had been distributed by the officers of the Government acting under the directions of the decree of the court, and notwithstanding the attorneys and the Indians knew of the distribution and had full opportunity to be heard, undertook after the money was distributed to file another suit on the ground that they, the claimants, had been left out of the distribution and that the United States had paid money wrongfully to certain of the beneficiaries and to the exclusion of themselves. The Court of Claims refused to order payment made a second time and to give judgment against the United States, and this judgment was affirmed by the Supreme Court of the United States in 187 U. S., 378, on the ground of laches on the part of the 272 who had not been paid. The court said:

"Petitioners seem to assume that although the Government took the course prescribed by the court in ascertaining individuals entitled to share in that fund, it assumed all the risk of mistake, however made, and that they could wait until

after the Government had acted and made the distribution and that no responsibility rested upon them to furnish evidences of their title. For reasons stated we cannot assent to this view. Where a fund has been created and the mode of distribution prescribed by the court which established the amount of the fund, its disposition in accordance with the course prescribed by the court must be held a finality and in the case at bar any further relief must be obtained from Congress and cannot be given by the courts."

The court further said:

"The failure to receive their share may be a hardship to these petitioners, but it must be remembered that the method of ascertaining those entitled was prescribed by the court and pursued by the Government. Having been so pursued we find ~~the fund~~ must be considered as properly distributed."

* * *

"This is not an ordinary judgment at law in which the plaintiff entitled to receive and the defendant bound to pay are both named, and in which the amount of a fund for distribution was determined, and directions made for ascertaining the beneficiaries of that fund. The defendant and the beneficiaries were each interested in the question of identification and both bound by the conclusion reached in respect thereto if the directions were fully complied with."

But what application have these cases to this situation in which the claimants are not acting contrary to any law of the Sac and Fox Nation; in which the law applicable, namely, the Act of 1852, had expressly directed that an-

nuities should be paid per capita to all tribal members and was silent as to the effect of separation from the tribe; to a case where the annuities under the several treaties were payable to all members of the Sac and Fox tribes and had no residence limitation on their rights? What application have they to a case in which the agent distributing the annuities was the Indian agent, an officer of the Government of the United States, to a case in which the Indians, the moment they removed went to the ex officio Superintendent of Indian Affairs who had negotiated, being Governor Chambers, the treaty with them under which they had removed from Iowa to Kansas? In which that official and the State Legislature had passed an act authorizing their settlement, and of which the United States must have taken judicial notice, even had it not express notice, as seems likely? In which the United States by treaty in 1859 provides for notification and assistance to the Indians in returning or otherwise they will lose their annuities, a recognition of the fact the claimants, and perhaps others, were absent? In which the United States concededly does not give notification or render assistance to the claimant Indians in returning, for it must likewise be remembered that, as settled in the Old Settlers case and the original Pam-to-pee case, Congress by the very Jurisdictional Act has recognized the claimants as a generic body, entitled to act for and in behalf of those in Iowa, as a titular body? In which later and while the annuities were still being distributed the specific attention of the Commissioner of Indian Affairs was called in January, 1863, to the fact that the claimants were in existence, numbered a certain number, had not received their annuities for years, and in which the Commissioner of Indian Affairs officially reported that there was a

question as to their right in the annuities? In which the United States later specifically gave the Indians, with knowledge they had not removed, the right to remain where they were? In which the forfeiture of the annuities was insisted upon for years as the result of an erroneous construction of the law and mistake of the law on the part of the persons occupying such relationship as trustee to *cestui que* trust or parent to child as the United States occupied to the claimants? In which the United States after full consideration has, in the language of the Old Settlers case, 148 U. S., 474, transferred the dispute to this court with broad, full judicial authority to decide the matter as justice and equity may demand upon the part of the strong to the weak? In which there was abundant opportunity at an early stage for the United States to have righted the wrong had it acted in accordance with what the law *was* and not what its officers *thought it to be*, to have recouped the excessive payments from the defendant Indians and have made up the amount due the claimant tribe or band, but instead pursues the exactly opposite course of perpetuating the injustice and illegality?

The analogous case to that at bar, so far as analogies are of value, is the first Pam-to-pee case (27 Ct. Cls., 493; 148 U. S., 691), and not the later Pam-to-pee suit. In the earlier case the point was raised that the Indians should have removed from Michigan and Indiana as required by the treaty, and that as to at least 1,100 of the Indians all their rights were gone because they had not removed within three years, as per the terms of the Pottawatomie Treaty. The Court of Claims said, however, that "The portion remaining may have acquired a right to share in the annuities, but the corporate power of

the tribe remained intact and incident to the larger body which emigrated."

It said:

"It is insisted upon the part of counsel for the defendants that the removal of the Indians was a condition precedent to their right to participate in the general fund of the united nation."

and, answering the proposition, continued:

"That cannot now be considered as an original question. The Government by its agents, laws and resolutions of Congress, has treated the removal and continued residence in the northern peninsular of Michigan as immaterial, and it is now too late to attempt to ingraft upon the rights of Indians a removal and continued residence as condition precedent to their right to participate in the funds arising from the various treaties made with the united nation."

The court said that in its opinion the claimants were entitled to a just proportion based upon the average of those remaining to those emigrating, and said that a table prepared by the United States giving these numbers "seems to have been recognized in such a way as that it becomes to the court the most reliable data on which to predicate a finding of those emigrating and those remaining."

The Supreme Court of the United States in 148 U. S. approved these findings by the Court of Claims. It further approved a finding by the court that all that it would undertake to decide in this case would be the aggregate right of the claimants and leave the distribution of the same among those entitled to share in the fund to the executive branch of the Government.

APPELLEES CONTENTION APPELLANTS ARE NOT OR WERE NOT FROM 1855 TO 1866 INCLUSIVE, A LEGAL ENTITY IS EQUALLY WITHOUT MERIT. THE JURISDICTIONAL ACT MAKES APPELLANTS AN ENTITY FOR PURPOSES OF DETERMINING THEIR AGGREGATE RIGHT. UNLIKE THE PAM-TO-PEE POTTAWATOMIE CLAIMANTS, MOREOVER, THEY NOW AND ALWAYS HAVE HAD A TRIBAL ORGANIZATION AND BEEN A COMMUNAL ENTITY IN FACT.

By the express terms of the Jurisdictional Act the court is empowered to adjudicate "all claims of the Sac and Fox Indians of the Mississippi in Iowa, against the Sac and Fox Indians of the Mississippi in Iowa and the United States for their proportionate shares, according to their numbers" of certain moneys, one of the claims described by reference in the treaty being specifically appellants present claim arising out of forfeiture of their share of tribal annuities from 1855 to 1866 inclusive. This court has held several times Congress has plenary power over the Indians, so that it was competent to give them an entity had they not one in fact, as they always have, and the language quoted clearly shows the intention of Congress that appellants should be treated as one legal entity or generic body and appellee Indians as another body and that aggregate numbers alone should determine the accounting if legal or equitable liability was held to exist.

The opinion of the lower court affirmed by this court said that there was no dispute as to the amount paid out by the Government and that liability was to be settled

upon the ratio "of the Indians remaining to those emigrating," and that a certain table prepared by the Government seemed to have been recognized in such a way as to become to the court the most reliable data upon which to predicate a finding of the relative proportion of those emigrating to those remaining. This court said that it was proper for the court to determine the amount in the aggregate due by the defendant without determining to whom or in what proportions the payment adjudged to be due should be paid.

In the case of the Pottawatomie Indians v. The United States, 27 Court of Claims, 403, affirmed by the Supreme Court of the United States in 148 U. S., 691, this court approved the subjoined language of the Court of Claims:

"In the legislation of our jurisdiction Congress have recognized the fact and condition that representatives of the Pottawatomie Indians of Michigan and Indiana in behalf of all the Pottawatomies of said States make claim against the United States on account of various treaty provisions and upon the fact and condition have provided a jurisdiction in this court to determine all questions of difference between the United States and said Indians. The purpose of the statute is to settle in an authoritative and judicial form all questions of difference arising from the claim of Pottawatomie Indians of Michigan and Indiana and any proceeding which accomplishes that purpose, irrespective of technical rules of pleading, is proper and legal under the law of our jurisdiction. * * *

"Congress have recognized by the very title of the act a claimant designated as the Pottawatomie Indians of Michigan and Indiana and under that

generic head is to be determined the aggregate right of such claimants, leaving the question of distribution to that Department of the Government which by law has incumbent on it the administration of the trust that in legal contemplation exists between the United States and the different tribes of Indians."

At the conclusion of its opinion this court expressed its regret that neither in pleadings nor concession of counsel could it find reason for directing judgment to go to a specific tribal entity as such to whose credit the judgment should be placed, but nevertheless directed judgment to be entered up, saying that under the condition of the record the lower court could do none other than leave to clerical functionaries the distribution to be made to those later proving entitled.

No such difficulty as this court foresaw was likely to, and as did later arise, as shown by the second Pam-to-pee case, can result in the instant case, for appellants have a tribal organization which the other Indians unfortunately did not have, and have had such from their arrival in Iowa in 1855. It was crude because in those early days very few of the Indian tribes had the formal systems of tribal government that as a result of contact with the whites has been adopted by Indian tribes in late years. As stated in the Annual Report of the Commissioner of Indian Affairs for 1853, page 9, "except the Wyandotte and Ottawas, who have a few simple laws, all the Indian tribes north of the Cherokee line are without any prescribed form of government."

The appellant Indians in Iowa from the first preserved the form of an Indian organization, having a recognized chief, a community of money and land holding and from

the first recognition by the United States being so treated by both appellees.

The very first Indians returning to Tama County in 1855, as shown by the affidavit of Push-e-to-neke-quā (H. R. 38, Rec. 120-21), though without annuities, save a little savings, and poverty stricken, had as their chief Ma-sha-na from 1855 to 1862 and when the man the Government in 1862 recognized as chief of all the Foxes, Mau-Min-Wau-Ne-Ka, left Kansas and went to Iowa, the latter at once assumed his chieftaincy there and Ma-sha-na retired. In 1866 the United States recognized the tribal character of the Iowa Indians by appointing an agent for them; in the Malin case, 111 Fed. Rep., the United States court decided they were tribal Indians and in all the Government reports they are referred to as a band of Sac and Fox Indians.

The Congress recognized them as a generic body in its repeated appropriations for an agent for them and in legislation from 1882 to the present time. The act of March 2, 1895, and the report of the Secretary of the Interior thereunder (Rec. 124), and of his assistant attorney general (Rec. 91) shows the present claim was treated as that of an entity and by act approved Feb. 13, 1891, the United States in adopting the so-called Jerome agreement with the Sacs and Foxes in Oklahoma ceding Oklahoma lands to the United States in recognition not only of the rights but of the tribal character of appellants placed to their separate credit on the books of the Treasury a large amount of money by providing as follows (26 Stats., 749; 1 Kappler, 398):

"Sec. 8. That there is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the sum of one hundred thousand dol-

lars to be paid to the Sac and Fox band of Indians now resident in Iowa, in full of all claims of every name and nature which said Indians now have upon the property included in the foregoing agreement of the Sac and Fox Indians in the Indian Territory or upon the United States, for the moneys arising therefrom, said sum to be paid to said Sac and Fox Indians of Iowa by the Secretary of the Interior, per capita, or in such other manner as said Indians shall direct, upon the execution by them, to his satisfaction, of a release as herein required."

If appellants' foregoing contention be correct then it follows as a necessary logical consequence that assignment of error, No. 9, is correct in asserting that the names, sex and ages of appellant Indians whose annuities were forfeited is incompetent, immaterial and irrelevant, and that the Court of Claims finding in this regard, made at the instance of appellees, is erroneous. Congress assuredly, by its statute, did not intend to create a record with the hundreds of side issues involved in proof of names, sex and ages and descent of the individuals making up appellant Indians therefrom, but instead left for adjudication only aggregate rights based on tribal membership as recognized by the tribe and never disputed by either appellee until the present litigation.

It is no part of the duty of the court to see that any judgment it may render shall be divided among the heirs of each individual who was an Iowa Sac and Fox of the Mississippi from 1855 to 1867, as was by Article V of the Old Settlers Cherokee Treaty, the express duty of the court in *Old Settlers vs. United States*, 148 U. S., though in that case three persons were permitted to sue in behalf of all and as the court permitted supernumer-

ary and superannuated ministers to do in *Smith vs. Swormstedt*, 16 How. (U. S.), 288.

This leaves only the question of numbers remaining. It is assigned as error (assignment No. 18), that the lower court held there was no "competent evidence" of numbers, the opinion of the court indicating it was regarded as an unlawful and unwarranted invasion of its prestige for Congress or the Indian litigants to attempt to prescribe any rule of "competent evidence" for the case, though under opinions of this court there is ^{evidence} "competent" otherwise in official reports that would be sufficient unless disproved, as was not attempted.

COMPETENT EVIDENCE HAS A TECHNICAL MEANING. IT WAS WITHIN THE POWER OF CONGRESS AND OF THE PARTIES TO PRESCRIBE OR STIPULATE RULES OF EVIDENCE FOR THE CASE. THIS COURT HAS HELD THE EVIDENCE OF NUMBERS SUBMITTED COMPETENT. BEING COMPETENT IT ESTABLISHED NUMBERS PRIMA FACIE AND NOT BEING OVERTHROWN BECAME CONCLUSIVE.

"Competent evidence" is defined in standard works on the law of evidence to be—

"That kind of evidence which the facts in issue require as the fit and appropriate means for their establishment in the particular case."

Stipulations between parties may make competent evidence a character of proof that but for such stipulation the court under settled rules of evidence would not admit; they have a right to make a rule of evidence for

their own case and so far as regards the "competency" of the evidence the court is bound thereby. Thus, in *Brown vs. Nally*, 151 N. Y., 258, it was held:

"Parties may by agreement accept oral evidence instead of the presumption ordinarily arising from written evidence. They have a right to make a rule of evidence for their own case * * * they may waive the rules established by the courts to govern the admission of evidence."

Thus in *Central R. R. Co. vs. Gamble*, 77 Ga., 584, held:

"By stipulation copies of papers may be read in evidence instead of the originals,"

or as in *Parker vs. Atlantic C. L. Ry. Co.*, 133 N. C., 335:

"A newspaper may be admitted as evidence of market values at a given date."

The foregoing applies specially to defendant Indians who, for mutual convenience and consideration, each side having affidavits, stipulated (Rec. 87) that the affidavits in H. R. Doc. No. 38, 57th Congress (Rec. 115-121 and 63-69)

"may be taken and received by the Court of Claims in the same manner and be given the same effect as if they were depositions regularly taken under the rules of court."

These affidavits, as against the United States, and indeed also against the defendant Indians under the plenary power of Congress in such matters (*Lone Wolf vs.*

Hitchcock, 187 U. S., 553), together with the other matters found in Congressional or Executive documents are "competent evidence" both under the jurisdictional act and, without that jurisdictional act, under the authority of the United States Supreme Court in *New York Indians vs. United States*, 170 U. S., 1, on the ground that they are public documents emanating from the legislative and executive departments of the Government. In *Collier vs. United States*, 173 U. S., 80, it appeared that Congress by the Indian Depredation Act of March 3, 1891, had provided that

"any testimony, *affidavits*, reports of special agents or other officers, and such other papers as are now on file in the departments or in the courts relating to any such claims, shall be considered by the court as competent evidence, and such weight given thereto as in its judgment is right and proper."

The Court of Claims deciding adversely to claimants on the ground the Indians "at the time and place (of the depredation) were not in amity with the United States," claimants appealed on the ground, in part, that the conclusion of fact as to amity "was solely rested by the court upon certain official reports and documents which were inadmissible." The Supreme Court held:

"These (the statutory) provisions express the manifest purpose of Congress to empower the Court of Claims to receive and consider any document on file in the departments of the Government or in the courts, having a bearing upon any material question arising in the consideration of any particular claim for compensation for Indian depredation, the court to allow the documents such weight as they were entitled to have."

In the instant case the Jurisdictional Act is on all fours, for it provides:

"The reports made to Congress on any of said claims by any department of the Government and printed as Congressional documents, shall be received as evidence in said suit, so far as the facts therein may be concerned, and shall be given such weight as the court may determine for them."

The affidavits and reports appeared, as Congress well knew, in these documents.

But, furthermore, these legislative documents would be competent evidence without the Jurisdictional Act. In *New York Indians v. United States*, 170 U. S., 1-32, the court said its attention "had been called to certain documents emanating from the executive and legislative departments of the Government," but that "it is insisted by the Attorney-General that, as these documents are not referred to in the findings of fact by the court below, this court cannot consider them; but as they are documents *of which we may take judicial notice*, we think the fact that they are not incorporated in the findings of the court will not prejudice us from examining them, with a view of inquiring whether they have the bearing claimed." The court said it might take notice of public documents and thereupon proceeded to notice facts contained in Congressional executive documents and annual reports of the Commissioner of Indian Affairs and Secretary of the Interior.

Applying the foregoing principles to the record in the instant case, we submit there is shown by competent evidence the minimum numbers the court must find of Sac and Fox Indians of the Mississippi were in Iowa from 1855 to 1867, inclusive.

THE NUMBERS ARE SHOWN BY AFFIDAVITS OF INDIANS ACTUALLY MIGRATING. ALSO BY REPORTS OF PUBLIC OFFICIALS. APPELLEES OWN ROLLS AND INDIAN AGENT REPORTS OFFER CONFIRMATORY EVIDENCE.

That a number of Sac and Fox Indians of the Mississippi had left the Kansas reservation and settled in Iowa about 1855, is alleged in the petition and admitted by the answer of defendant Indians and, as to the United States, is abundantly shown in several reports of the Commissioner of Indian Affairs and the Secretary of the Interior. It likewise is shown by the fact, of which the court as a federal court, takes judicial notice that the Iowa legislature passed a special act as to them in 1856.

How many there were is shown:

1. By the affidavits of Pa-ha-she-quā and of Me-no-quā (Rec. 118), who each swears that he was one of the Sac and Fox Indians that originally returned to Iowa in 1855, at which time each was fourteen years old, and that in 1855 the number who came to Tama County, Iowa, was 144. Counsel for the Government in his brief in the lower court conceded it is established that 144 Sac and Fox Indians in 1854 left the Kansas reservation and went to Iowa.

2. By the affidavit of Push-e-to-neke-quā (Rec. 119) that as chief of the Iowa band it was his duty to keep in his possession a record of the enrollment and numbers of the tribe, evidently made up by obtaining names from migrators in particular years, that this record or roll was now in his possession and that it showed the number who returned from Kansas in the year 1855 to have been 144.

3. These affidavits find confirmation and corroboration in the records of defendant Indians themselves and of the United States, the annuity rolls of defendants (Rec. 100) showing coincident with the removal of the claimant Indians to Iowa a large decrease in the numbers of the Sacs and Foxes in Kansas.

4. By treaty between the United States and the Sac and Fox Indians of the Mississippi in Kansas, the fact that quite a number of the tribe were resident away from the reservation being officially recognized in Article 7 of the Treaty of 1859, by a provision for assistance to any needy tribal members who might be willing to return.

5. By a report made by an official representative of the State of Iowa, who in 1862 at the request of the Governor of the State made an investigation and report with reference to these Indians. This report made by Mr. George L. Davenport is entitled to the full faith and credit due to any personal investigation made by a Government official, State or Federal, though the court below on the rehearing intimated it was confined to Federal reports. It states under date of September 26, 1862:

"I have just returned from the Fox village in Tama County. * * * This little band of Fox Indians returned from Kansas Territory eight years ago and brought with them \$800 out of their annuities for that year. (Note—This would make the date of their last payment 1854) * * * They have not received any of their annuities for seven years, and to which they were justly entitled, as they are required to take all the members of each family to the agency in Kansas Territory to receive it. The distance being very great they are not able to do so. They

suppose their share of the annuities have been set aside for them. They number 69 men, 65 women and 51 children."

6. By the affidavits of Mau-sau-pe-pau-tau (Rec. 115) that he returned from Kansas to Iowa in 1862 and that the number who returned at the same time he did was 77; of Al-ama-t and Wa-pe-no-ka that each returned from Kansas to Iowa in 1863 and that the number returning that year was 42; of Nee-she-ma-ne that he and 12 others returned in 1864, and of Pa-pa-ke that he and 11 others returned in 1865. The affidavits of Pa-ha-she-qua and Me-no-qua state that each had been in Tama County since 1855 and they give the number returning in each year while Push-e-to-neke-qua by affidavit made in 1900 states that he has a record of enrollments in his possession and that the enrollment shows there returned from Kansas in the year 1855 to Iowa 144 Indians, the enrollment record running up at the end of 1862 to 267, at the end of 1863 to 303, the end of 1864 to 316, at the end of 1865 to 327, and at the end of 1866 to 354.

While this last affidavit does not plainly so state it would seem evident from the affidavit that the enrollment was made up by adding names of new arrivals, whether by migration or birth to the original list and that the number given each year did not make deductions for deaths.

7. By the official census taken by the United States in 1867 through Leander Clark, U. S. Special Agent, who paid, as shown by Exhibits C, p. 17 of H. R. 38, 57th Cong. 1st Sess., taken from the accounts on file in the Treasury Department, annuities to 264 Sac and Fox Indians of the Mississippi in Iowa in the second quarter of 1867. The annual report of U. S. Indian Agent Clark as

shown in the annual report of the Commissioner of Indian Affairs for 1867, states on this subject:

"On the 31st of May last the census of the Sac and Fox Indians residing in Iowa, taken with a view to their per capita payment annuities, shows the whole number of Indians at that time to have been 264, namely, 84 men, 91 women and 89 children, or 125 males and 139 females."

The report further states "that part of the Sac and Fox Indians of the Mississippi who reside in the State of Iowa have existed here for a long time—probably 12 or 15 years—without help or aid from the general Government."

THE DAVENPORT AND CLARK REPORTS
MADE PURSUANT TO OFFICIAL DUTY ARE
PRIMA FACIE PROOF OF THE FACTS
THEREIN STATED.

The reports made by Agents Davenport and Clark are competent evidence of the facts stated in said reports and established prima facie the facts therein stated. As said in *U. S. vs. McCoy*, 193 U. S., 601, it is "the well established rule that official reports and certificates made contemporaneously with the facts stated, and in the regular course of official duty, by an officer having personal knowledge of them, are admissible for the purpose of proving such facts."

This position was taken by the United States in the New York Indian case, the brief of the Government on reargument (p. 30) in that case stating it was proved as a fact that Onondagas, Tuscaroras and others would not remove, the brief saying:

"It is submitted that the report of a public officer charged with the duty of ascertaining facts must be taken as true until proved to be false. It is always presumed in the absence of evidence to the contrary that public officers act with due caution and good faith in the performance of their duty (Throop on Public Officers, Secs. 558-567; Meachem on Public Officers, Sec. 579), and hence where the officers' duty requires an official statement of fact, such statement is presumed *prima facie* to be true. The general doctrine is too familiar to call for a detailed reference to cases which have upheld it, but see *Washington vs. Hosp*, 43 Kansas, 324, and *Rogers vs. Jennings*, 3 Yerg (Tenn.), 308.

"In the present case the Commissioner was appointed to represent the United States at a council called to learn the final wishes of the Indians as to emigration. In the performance of his duty it was absolutely necessary for him to call upon the chiefs, the official representatives of the tribes, to state what those wishes were, to hear what they had to say, and to report it accurately to the Indian Office. To have failed in any of these points would have been a gross breach of official duty and as there is absolutely nothing in the evidence to cast the slightest suspicion upon him, he must be presumed to have fulfilled his duty and his report of the official declarations of the chiefs must be taken as true. Furthermore, a public officer is called upon to act with caution and discretion, and hence this commissioner's action in testing the correctness of these statements by holding an enrollment may fairly be regarded as coming within his official duty, and this being so, his report of the enrollment was also a matter of official duty, and hence its correctness may be presumed."

It will be noted that the two reports of State Agent

Davenport in 1862 and U. S. Indian Agent Clark in 1867, demonstrate almost conclusively the healthfulness of the Iowa home of the Indians and the tendency to increase in numbers there, for whereas in 1862 children formed only 27 per cent of the total, in 1867 they formed nearly 34 per cent of the total. These two reports can not be disregarded, for they are the positive evidence of disinterested officers of the State and the United States and are confirmed by the later annuity rolls showing a steady increase in numbers of appellants and a decrease of appellee Indians.

Claimants respectfully insist that the foregoing being all competent evidence the court is not justified in refusing to give it the weight to which it is entitled.

As said by the United States Supreme Court in *Crane vs. Morris*, 6 Peters, 598:

"Whenever evidence is offered which is in its nature *prima facie* or presumptive proof, its character as such ought not to be disregarded and the court has no right to disregard it,"

and again in *United States vs. Wiggins*, 14 Peters, 334, and *Lilienthal vs. United States*, 97 U. S., 272, the court said:

"*Prima facie* evidence of a fact, says Mr. Justice Story, is such evidence as in judgment of law is sufficient to establish the fact, and if not rebutted remains sufficient for the purpose."

THE COUNTERVAILING EVIDENCE IS PRACTICALLY NIL. THE GOVERNMENT REPORTS ALL TEND TO CONFIRM IT. SECRETARY HITCHCOCK AFTER INVESTIGATION CONCLUDED AVERAGE MINIMUM NUMBERS WERE ESTABLISHED. THE GOVERNMENT'S MISTAKE WAS OF LAW NOT FACT.

The only evidence to meet the prima facie case as to numbers offered by appellee Indians is contained in three affidavits, of which one is that of their counsel (Rec. 67) and another a joint affidavit of Oklahoma Sac and Fox Indians that the affidavit of their principal chief McKosito, was true, according to their best knowledge or belief, some of ~~and some~~ ^{others} being born subsequent to the affirmed events. The affidavit of McKosito (Rec. 63) says nothing as to 144 or any other number of appellants having left the tribe and gone to Iowa in 1854. It begins the migration with that of Maw-men-wau-mecah and states that later other families left. It states the cause of separation as opposition to schools and civilization (contrary in large part to the report of Agent Martin in 1866). It admits the separatists numbered "something more than one-half" of the Fox Tribe. It denies any complaint against the healthfulness of the Kansas reservation. The smallpox epidemic in the early fifties is not mentioned. Positive evidence as to a particular fact, uncontradicted by any one, this court in *Quock Ting v. The United States*, 140 U. S., 417, said should control the decision of the court.

The contemporaneous annuity rolls of the Indian bureau and reports of its officers tend inferentially to strengthen instead of weaken the evidence by affidavit.

Exhibit A, R, H, 38 (Rec. 100), shows that the United States Indian Agent for appellee Indians in the second quarter of 1855 paid annuities to 1,626 persons, whereas in the fourth quarter of 1855 he paid to only 1,498 persons, and in the second quarter of 1856 to only 1,445 persons. As the Indian practice for years was to carry on the rolls and make payments for any person dying or absenting himself between a former and a latter payment, the figures show that in the year the claimants removed to Iowa the Kansas rolls decreased 181 persons. Obviously, this coincident decrease in the Kansas bands of over 11 per cent is strongly confirmatory of the affidavits of the two Indians that from their personal knowledge 144 Indians went to their old home in Tama County that year.

The annual reports of the Commissioner of Indian Affairs for 1855 and 1856 show those were healthy years, relatively speaking, in Kansas.

The annual report of U. S. Indian Agent James at the Sac and Fox Agency under date of September 1, 1855, as shown at page 155 of the annual report of the Commissioner of Indian Affairs for the year 1855, states:

"With the exception of a few cases of cholera in the spring, which generally proved fatal, there has been scarcely any sickness."

And again under date of September 1, 1856, he wrote (p. 126, Report Commissioner of Indian Affairs):

"I have the honor to submit this my fourth annual report. The Sac and Fox Indians are decreasing every year—they number three hundred less than they did at the first enrollment.

I make no calculation upon any improvement in their moral condition so long as they receive the large annuity they now draw."

The Agent was grossly negligent or he could have learned that 144 members of the tribe had returned to Iowa. They embraced whole families; a large part of the Fox Tribe.

Compare this with the figures as shown in subsequent years by the Government's own annuity records of payments at the Sac and Fox Kansas Agency, Exhibit A, H. R., p. 6; second quarter of 1857, No. of Indians 1,367; second quarter of 1858, No. of Indians 1,330; second quarter of 1859, No. of Indians 1,237; second quarter of 1860, No. of Indians 1,280; third quarter of 1861 (there being no second quarter shown), No. of Indians 1,341. In none of these years was there any such decrease as is shown at the period around 1855, when two of the witnesses for claimant state they and 142 others treked back to Iowa, and it is significant that the largest decrease during the latter period was in 1859, when a new treaty was proposed, as was under discussion in 1853 and 1854. Turning to the annual reports of the Commissioner of Indian Affairs we find a ready explanation of the increases shown in 1860 and 1861, for at page 110 of the report for 1860 it is stated:

"The enumeration of this tribe, according to the census recently taken, is 1,280 individuals, of which 601 are males, and 679 females, * * * ~~and~~ referring to the census and statistical return of this tribe for the year 1859, you will at once observe that an apparent increase of 43 persons has taken place since that time. This at first sight

would seem to be somewhat extraordinary, but yet can be easily accounted for when taken in connection with the fact that during the past year a number of the Sacs and Foxes of Missouri, who are placed under the charge of Major Vander-slice, at the Great Nehama Agency have left their proper reservation, and, with the consent and permission of the Indians under my charge, have been allowed to enrol and receive their annuities at this place. Another reason for apparent increase is readily found in the fact that friends and relatives of such members of the tribes as have died since the Treaty of October 2, 1859, has been signed, have until the present time been permitted to receive the annuity of the deceased. Otherwise I cannot ascertain that any increase of this tribe has taken place since the date of my previous report."

And at pages 60 and 61 of the report for 1861 it is stated:

"On the 8th day of August last I paid this (Sac and Fox) tribe one-half of their semi-annual payment, it being \$17,500. The roll used at that payment shows that the tribe is composed of 392 men, 484 women, and 465 children of both sexes—a total of 1,341 souls. It should be remembered, however, that this payment was deferred by the department until four months after the usual time, and that all the numerous deaths which had taken place since the previous payment in October, 1860, caused no reduction in numbers, as the persons dying were allowed to be reckoned by their friends."

In other words, the tribe and the United States were admitting to the rolls and paying annuities to members

of a different tribe of Indians and paying on account of dead Indians while the claimants in Iowa were not paid the annuities lawfully theirs.

Exhibit A shows that in the third quarter of 1861 the number of Indians was 1,341, in the fourth quarter of 1862 only 1,098, and in the fourth quarter of 1863 only 983. It is shown by affidavit and by the admissions of the defendant Indians themselves that at this period Mau-men-wau-me-cah and his followers left Kansas and returned to Iowa, and in this way is accounted for the large decrease shown in these two years just as the first migration accounts in large part for the heavy decrease in the rolls between 1855 and 1857. The affidavits of several of the Iowa Indians show that (H. R., 38, Rec. 115) in 1862 there came to Tama County, Iowa, 77 Sac and Fox Indians, and in 1863 there came 42 Sac and Foxes.

The reports of the Indian Agent show, just as in 1855-57, that the agent observed the decrease. In the case of Mau-men-wau-me-cah Agent Martin's report of 1866 establishes that arbitrary action of the agent caused the Fox principal chief to trek to Iowa.

In the report of the Agent at page 108 of the annual report of the Commissioner of Indian Affairs for 1862, it is stated:

"The roll used at the last payment gives the number of this tribe, 343 men, 413 women, and 424 children of both sexes, or a total of 1,180 souls. This would indicate a decrease for the year previous of 161 persons. The actual decrease is considerably less, from the fact that I have taken special pains to prevent frauds by some of the families giving in more numbers than

they are entitled to, which, under the per capita payments, increases by so much the family annuity. But with this allowance the percentage of decrease is fearful."

And in 1863 the Agent, under date of October 20, 1863, in the annual report of the Commissioner of Indian Affairs for 1863 at page 265, states that on enrolling the tribes he found they numbered 975 and added:

"We feel satisfied that there has been no decrease in the tribe during the past season, but believe the next enrollment will show an increase, as the tribe has been remarkably healthy during the summer and fall seasons."

Thus, in two years a decrease of 205 occurs in a healthy period. It is readily accounted for when it appears that 119 of them found their way to their Fox brethren in Tama County.

In 1864 the expected increase of the agent did not materialize for in the third quarter of 1864 it appears only 891 Indians drew annuities and in May, 1865, the number is down to 805. In each of these years, therefore, there is confirmatory evidence from the Government's own records and the reports of its own agents of the affidavits of the Iowa Sac and Fox Indians and of the reports of Agents Davenport and Clark.

The fact that from 1855 to 1866, inclusive, Exhibit A (Rec. 100) shows eight agents or disbursing officers paid the annuities may palliate conditions but cannot relieve the trustee or appellee Indians.

The Secretary of the Interior himself while reporting adversely to the claim on the erroneous ground of for-

feiture spoke of the corroboration the Kansas decreases in numbers made for the claim of migration to Iowa.

Secretary Hitchcock in H. R. 38 (Rec. 114) said:

"From the examination made by the department it appears that a number of Sacs and Foxes left Kansas and joined their brethren in Iowa after 1862. The record shows an apparent decrease of 345 from the winter of 1861 to early in 1863, a period of eighteen months. No special reasons or cause are assigned for this decrease, nor is it conclusive that all of these persons went to Iowa; but by affidavits submitted about the time of the above-named examination it was claimed that 77 arrived in Tama County in 1862 after September in that year, and it is reasonable to suppose that they were part of the 345 who had apparently left Kansas as stated. According to the report of Mr. Davenport, 185 found by him on his visit in 1862, had been living in Tama County for eight years, *and it appears that his visit was made prior to the arrival of the 77 mentioned.* (Italics ours.) At the first payment of the Indians, made in the spring of 1867, 264 were enrolled.

"The department is convinced that the number (185) reported by Mr. Davenport in 1862, is approximately correct. No doubt there were some accessions from Kansas from 1862 to 1866, and also some increase from natural causes, and after a thorough examination of the records of the Indian Office and of the Department, it is believed that the average number of Sac and Fox Indians in Iowa from 1855 to 1862, both inclusive, was about 160, and from 1863 to 1866, both inclusive, about 225."

In view of the competent evidence of numbers thus

shown, we submit that because the claimants in earlier years might have shown themselves entitled to a larger percentage of the annuities than now in position to prove is not warrant for refusing them the benefit of the numbers they have been able to prove by clear *prima facie* case. The *prima facie* case as to the numbers in Iowa from 1855 to 1867 is not rebutted by defendants, and hence under the rule of evidence laid down by this court should be treated as conclusive, there being nothing improbable or beyond belief but the contrary in the statements made.

An attempt has been made to weaken the force of the foregoing by an allegation that some of appellant Indians returned, and indeed even that they made a practice of returning annually for annuities from Iowa to Kansas. The size of the annuities and the distance to be traveled alone would make the allegation improbable, and both the findings of the Court of Claims and the great weight of the evidence is against the allegation. On this point the burden of proof was not with appellant but with appellees.

Finding VI of the lower court (Rec. 37) states:

"Whether any of those Indians who left the Sac and Fox reservation in Kansas and went to Iowa, as hereinbefore set forth, ever returned to Kansas and received their annuities is not shown by competent evidence."

Counsel admit the court should have considered affidavits and official reports on this point and erred in this, but its finding had it done so must have been the same. The inconsistency and lack of accuracy and logic in the court's action in the case, however, is shown in its opin-

ion, for notwithstanding this finding, after the motion for rehearing, in the opinion then written to sustain the judgment directed, the court says (Rec. 43) :

"But it does appear that some of them did thus return for that purpose" (drawing annuities).

The report made by Agent Davenport in 1862 is direct upon this point, for he says (Rec. 56) :

"They have not received any of their annuities for seven years and which they are justly entitled to, as they are required to take all the members of each family to the agency in Kansas Territory to receive it. The distance being very great, they are not able to do so. They suppose their share of the annuities have been set aside for them."

The dire poverty of the Indians tends to support the claim of the Indians and the report of Agent Clark in 1867 (Ann. Report Com. Ind. Affairs for 1867, p. 347) is strong corroboration, it saying :

"That part of the Sac and Fox Indians of the Mississippi, who reside in the State of Iowa, have existed here for a long time—probably twelve or fifteen years—without help or aid from the general government. * * * The payment commenced by me in April, and completed on the first day of June last, with the exception of a small amount of blankets and clothing furnished the year before, is the first that the Indians under my charge have received from the government since they separated from the balance of the tribe. From the fact of their extreme poverty all this time * * * I am unable to report any considerable degree of progress in civilization."

To counteract this practically contemporaneous record and the fact that no agent in any annual report makes any mention of his paying any annuities to Indians returned from Iowa, the only even hearsay declarations on this point being those of Agent Martin in 1863, after the issue had been raised and after charges against himself, all the appellees offer is an affidavit by Chief McKosito, that is self contradictory. In this affidavit (Rec. 63) after beginning with Maw-men-wau-me-cah's separation he says:

"Neither this chief nor any of the families who followed him returned to the Kansas reservation. Afterwards, families related to those who had already gone and other disaffected families, followed from time to time."

Then on page 64, McKosito says:

"And deponent further says that while he can not name the Iowa parties who returned to the Kansas agency from time to time from Iowa and drew their annuity, yet he knows it is a fact that a number of them did this, and continued it as a practice from year to year. There is one instance in the memory of deponent where an Indian by the name of Me-shu-ma-ne left the agency some time *on* or about 1864 and that he returned again to the agency and from time to time drew annuity payments, his last drawing being in 1872. After the last-named year this man returned to Iowa having with him two other Sac and Fox Indians, namely Na-hah-shee and Quin-a-paw, and so far as this deponent knows neither of these Indians ever returned to the agency."

So far as concerns the present claim to and including

1866, we insist there is no evidence to rebut the evidence that appellants drew no annuities after separation in Kansas and the same we hold true on a clear preponderance of the evidence as to the claims from 1867 to 1884 and thence to date.

There is no evidence likewise that appellants numbers included any except Sac and Fox of the Mississippi and in their whole history the Sac and Fox in Iowa had only three persons of doubtful origin or rights on their rolls and they were enrolled through marriage about 1886 and dropped in 1900 (Rec. 53). The same record (pp. 52-53) contains evidence as does the annual reports of the Commissioner of Indian Affairs heretofore quoted that appellees enrollment numbers were swollen by improper admissions of Sac and Fox of the Missouri, though appellants calculations will be made on the annuity rolls as they exist.

The only remaining point is as to notification under the treaty of 1859. The burden of proof as to this was on appellees. Assistant Commissioner Larrabee and his superior, Commissioner Leupp, were strongly biased against appellants as obstinate, unruly Indians and so reported, yet when called on (Rec. 55) for evidence on the point as to notification, Mr. Larrabee answers the Court of Claims call as follows:

"The records of that period are so incomplete as to details that the Office is unable to say what, if anything, was done in the matter. An examination, as thorough as could be made at this time, fails to indicate any action of the kind indicated, but this is not conclusive evidence that there was none, as experience has shown that the old records are not altogether reliable."

Counsel, in view of the foregoing, therefore respectfully submit that it is the duty of this court to direct that judgment shall be entered up for them on the basis of the numbers of appellant Indians in Iowa from 1855 to 1864, both inclusive, less the small payment made in 1866, as compared with the numbers of appellee Indians. While they believe it less than the numbers to which rightfully entitled, counsel have adopted the average figures of Secretary Hitchcock of 160 from 1855 to 1862, both inclusive, and 225 from 1863 to 1866, both inclusive. For appellee Indians they have taken the annuity rolls (Rec. 100) and the amounts there stated to have been disbursed (the aggregate disbursements exceeding \$51,000 a year because a prior fund had been created to credit of the Sac and Fox of the Mississippi under the provision in the Treaty of 1842, permitting money to be retained for medical and other purposes, a different policy later obtaining after the Annuity Act of 1852. The annuity rolls this court and the Court of Claims both adopted in the Pam-to-pee case as the best evidence as to numbers of Indians entitled to annuities (See *Pottawatomie Indians v. The United States*, 27 Ct. Cls., 418). The United States, in the annual report of the Commissioner of Indian Affairs for 1855 in giving statistics of Indian tribes, said it was made up from the best data obtainable, namely, the 1854 annuity rolls. Having no money to receive, and being away from the Kansas reservation, appellant Indians numbers certainly were larger than those given in official reports. But accepting the minimum numbers, as found by Secretary Hitchcock, and adopting the annuity rolls of appellee Indians, we find two annuity payments each year. Averaging the number by years there were 160 of appellants

for each of the eight years, or a total of 1,280 for eight years. For appellees the average per year is: 1855, 1,562; 1856, 1,413½; 1857, 1,342; 1858, 1,311½; 1859, 1,236½; 1860, 1,300; 1861, 1,280; 1862, 1,139, or a total of 10,584½. The total amount paid out in annuities, as shown in Exhibit A (Rec. 100), last column, under title "per capita annuities" from 1855 to 1862, both inclusive, was \$562,224. On the basis of 1,280 of appellants to 10,584½ of appellee Indians, judgment should be entered on an accounting for the period from 1855 to 1862, both inclusive, for \$60,655.46. Taking the basis of 225 for each year from 1863 to 1866, both inclusive, appellant Indians number 1,000 in four years and appellee Indians an average in 1863 of 989½; in 1864, 912; in 1865, 820½, and in 1866, 796½, or a total of 3,518½. The total amount paid out in annuities during the four years was \$181,805.35, to which on the basis of 1,000 for appellants to 3,518½ for appellee Indians appellant is entitled to \$40,235.77, which, added to \$60,655.46 for the period from 1855 to 1862, inclusive, makes a total of ~~\$95,492.17~~ **\$100,891.77**. Deducting \$5,359.06, the amount expended as shown by Finding of Fact V (Rec. 36), leaves \$95,432.17 strictly annuity account alone. For this last amount appellant asks judgment on strictly annuity account alone against both appellees for the period from 1855 to 1866, both inclusive.

The Treaty of 1859, proclaimed in 1860, provided as one of its stipulations that the Sacs and Foxes absent from the reservation should be notified to return and assisted in transportation and subsistence to return and that if they did not return within one year they should be barred from participation in tribal benefits and advantages.

Granting that prior to this, national matters and authority, excepting the chief money, might be said properly to reside with and be vested in those who remained upon the reservation, according to the treaty, and did not migrate with the returning Fox Indians to Iowa, certainly so when the emigrants did not comprise a great majority of the Foxes, it still, counsel submit, holds true that the United States is liable to appellants as the absent members of the Sac and Fox Tribe for not fulfilling its promise in the Treaty of 1859 to notify and aid absentees to return, and that in default of such notification the absentees are entitled to their share, aside from annuities, of moneys spent on national account from 1861, the year after proclamation of the treaty, to 1867, the year a new Act of Congress came into play. These payments, as shown in Exhibit A (Rec. 101), are: National account, \$37,567.34 (deducting two small items of earlier years), physician and medicines, \$5,250, mission school, \$2,508.03, iron and steel material, \$2,028.94, and tobacco and salt, \$1,999.45, a total of \$50,555.59. The proportion due appellants on the basis of 185 Indians in 1861 and 1862, and 225 the balance of the period, is \$9,476.21 on this miscellaneous account, for which judgment is asked, making the total judgment asked with reference to the first claim from 1855 to 1866, both inclusive, \$104,908.38.

THE SECOND CLAIM IS FOR A PRO RATA SHARE OF ANNUITIES ON THE BASIS OF PROPORTIONATE NUMBERS FROM 1867 TO 1884, INCLUSIVE. CONGRESS AND THE INDIANS, BY TREATY, SO PROVIDED. THE INDIAN OFFICE MADE A CENSUS IN MAY, 1867, AND FIXED THE PROPORTIONS ON THAT BASIS OF APPELLANT AND APPELLEE INDIANS. ITS DUTY WAS TO MAKE ANNUAL RESTS. IT MADE ONLY ONE IN 1867. APPELLANT INDIANS YEARLY INCREASED AND APPELLEE INDIANS STEADILY DECREASED IN NUMBERS. THE INJUSTICE TO APPELLANT IS OBVIOUS. EACH IOWA INDIAN RECEIVED LESS ANNUITY AT EACH PAYMENT AFTER THE FIRST THAN EACH KANSAS INDIAN.

By the Indian Appropriation Act of March 2, 1867 (14 Stats., 507; Rec. 38), it was enacted:

"That the band of Sacs and Foxes of the Mississippi, now in Tama County, Iowa, shall be paid pro rata according to their numbers, of the annuities so long as they are peaceful and have the assent of the government of Iowa to reside in that State."

Under the provisions of that act, as shown in the annual report of the Commissioner of Indian Affairs for 1867, a census was taken of the Kansas Sacs and Foxes and of those in Iowa. Indian Agent Wiley's report (Ann. Rep. Comsr. Ind. Affs., p. 299) says of the Kansas census: "On the 21st day of May last, the census of the Sacs and Foxes was taken with a view to their

semi-annual payment, and shows the number of Indians to be as follows: Men, 222, women, 266, children, 227, total, 715." Indian Agent Clark's report (page 347, same volume) says: "On the 31st day of May last, the census of the Sac and Fox Indians residing in Iowa, taken with a view to their per capita payment of annuities, shows the whole number of Indians at that time to have been 264, viz.: 84 men, 91 women and 89 children, or 125 males and 139 females." By Treaty of February 18, 1867, proclaimed October 14, 1868, the Indians had agreed to special protection, in accordance with the Act of Congress, for those in Iowa, but the signatories to that treaty had provided for a forfeiture of rights of any other absentee Sacs and Foxes who should continue away (Finding of Fact VIII, Rec. 37), Article 21 of the treaty inviting all absentees to return to participate in the advantages to be derived from the investment of their national funds, sales of lands, etc., the absentees to be notified to return and permanently unite with their brethren, the article concluding (15 Stats., 495; 2 Kappler, 955), "and that no part of the funds arising from or due the nation under this or previous treaty stipulations shall be paid to any bands or parts of bands who do not permanently reside on the reservation set apart to them by the Government in the Indian Territory, as provided in this treaty, *except those residing in the State of Iowa* (Italics ours); and it is further agreed that all money accruing from this or former tribes [treaties] now due or to become due said nation, shall be paid them on their reservation in Kansas; and after their removal, as provided in this treaty, payments shall be made at their agency, on their lands as then located."

The record shows that after the census of 1867 referred to the Indian Office under the Act of 1867 allotted to appellant annually \$11,174.66 and continued that allotment arbitrarily until 1884, when the result of the complaints for some time of the Iowa residents that they were not receiving their due pro rata proportion of annuities was that under a "rest" made in 1884 they received over \$15,000 a year. Assistant Attorney-General Hall (Rec. 91) investigated the matter at the instance of the Secretary of the Interior under the Act of March 2, 1895, and reporting under date of December 23, 1895, after an examination of the records, said:

"It does not appear what number of Sac and Fox Indians resided in Iowa from 1866 to 1885. The amount of money paid to them annually, however, from the annuities was \$11,174.66."

An examination of the annuities paid in 1867 to the Kansas Sacs and Foxes and so credited on the books of the Treasury (Exhibit B, Rec. 102), shows they were paid as annuities in that year \$850, \$12,928.71 and \$16,775, or a total of \$29,353.71, to which add the \$11,174.66 as the annual amount reported by Assistant Attorney-General Hall and there is a total of \$40,527.37 as the amount paid as annuities for the year 1867. This, on the basis of the census numbers of 715 Kansas and 264 Iowa Sacs and Foxes, does not make a true balance by the sum of \$89.01. In some years of the period a true balance so calculated so appears.

But it is well known that the practice was to pay to any stray Indian, who returned to the Kansas reservation, any annuity payment he might have missed through absence for cause at the last payment, so that an abso-

lutely true balance is not to be expected. Likewise the practice of the Indian Office is not uniform as to charging up exchange or transportation of money to the United States or to the Indians. In the case of the Sacs and Foxes of the Mississippi the treaties provided place of payment as St. Louis or some other convenient place on the Mississippi, and in the annual report for 1859 the Sac and Fox agent notes that he, by direction, repaired to St. Louis in that year and received the annuity payment—probably a routine circumstance not mentioned by others. Therefore a strictly true balance is not to be expected.

Secretary Hoke Smith (Rec. 131) thus reported the facts to Congress:

“The first payment to the Iowa branch was made early in the year 1867, the proportion of said annuities paid to them being \$11,174.66, payments to them at that rate being continued up to and including the fiscal year 1884.”

Congress, by the Jurisdictional Act, made these statements of matters of fact evidence, and counsel submit that in the absence of impeachment they should be accepted.

As to the numbers from 1867 to 1885 of the appellant and appellee Indians, we submit there is in the record the best possible evidence and evidence which, as matter of law, Assistant Attorney-General Hall and the Court of Claims, erred in ignoring, namely, the evidence of the Government's own annuity rolls, as shown in Exhibit B (Rec. 102) and Exhibit C (Rec. 111). Those rolls, made by the trustee and produced as evidence of the discharge of his trust duty, certainly are strong prima

facie evidence, and they are not impeached. As stated, the Court of Claims in the Pottawatomie case, 27 Ct. Cls., 418, accepted rolls of not equal presumptive verity, saying:

"That table was prepared by the officers of the department, and it seems to have been recognized in such a way as that it becomes to the court the most reliable data on which to predicate a finding of the relative proportion of those emigrating and those remaining."

The only statement tending contrarywise in the record counsel believes to be the response made by Acting Indian Commissioner Larrabee to the call made at appellant's request in which he states: "From the best information obtainable there does not appear to have been any fixed numbers adopted and used as basis for apportionment during the periods specified" (from 1807 to 1884). The answers of Mr. Larrabee throughout, it will be found, were general and indefinite. That may have been due to confining his answer to his own records, or not making the most complete examination of those and drawing necessary conclusions, or to not obtaining information from the Auditor for the Interior Department, an official under the Treasury Department. In any event, they do not warrant impeachment of the express finding of fact by the Secretary of the Interior twelve years before.

Furthermore, that a fixed number was used and that the mistake was one of law and not of fact in making one "rest" instead of annual "rests" is persuasively shown by the identical mistake made under the Act of 1884, when one "rest" instead of "annual rests" was

made under that act and that "rest" continued to the present time, although contrary, counsel contend, to the plain intendment of the law. Mr. Larrabee (Rec. 52), on this point says that the numbers used, a correction being made in 1887, was "Iowa branch 317; Oklahoma branch 505 from 1884 to 1886, inclusive, and 513 from 1887 to 1907, inclusive," this according with Mr. Hall's statement (Rec. 92) that fixed numbers were made and then continued under the Act of 1884, and with Commissioner of Indian Affairs Jones' report (Rec. 71), that claimants' "proportionate share of the annuities was adjusted in 1884, according to their increase in numbers since 1867, and they have since received their 317-830 share of the same."

The crux of the situation then is, was one rest or annual rests required by treaties and laws, and, if not, was appellant prejudiced?

What was being distributed was annuities provided by treaty and statute to be distributed equally to all tribal members. Appellant's tribal rights had been recognized. Equal annuities only would be a compliance with treaties. The act was in accordance, and not in conflict, with treaties. It said appellants "shall be paid pro rata according to their numbers, of the annuities." This meant they should each receive the same amount as each Kansas Indian or it meant nothing. It necessarily meant annual rests, and convenience of bookkeeping and ease of officials would not warrant fixed, arbitrary amounts.

How one fixed rest worked out is apparent. The Indian Office yearly or semi-annually settled on the annuity payments to be made, after deducting pay of chiefs, support of National Government, etc. Each Iowa Indian then would receive from the amount allotted to Iowa a

per capita payment the result of the division of the number actually entitled by enrollment into the amount available and the same in Oklahoma. Had the Iowa and Oklahoma branches remained in number 317 and 513 this would have worked in accordance with the statute, and had they increased or decreased in the proportions of 317 to 830 and 513 to 830, the result would have been an equal per capita distribution according to numbers, but they did not. The Government* figures, as published in H. R. 38 (Exhibit C), show a steady advance in numbers by the Iowa branch until 400 instead of 317 became their approximate number, whereas no such result occurred in Oklahoma. Finding of Fact No. 11 assumes that appellant contends there were fixed amounts set apart and set apart unjustly. What appellant contends, however, is that fixed percentages were adopted and permitted to remain in force for a long term of years instead of having annual "rests" as it were and apportioning the fund yearly among tribal members equally, regardless of whether they were in Oklahoma or Iowa.

How the matter prejudiced claimants may be illustrated by taking one year, say 1890. In that year, as Exhibit B, page 11, H. R. 39 shows, there was \$25,615.40 disbursed in per capita payments among 527 Sacs and Foxes in Oklahoma and \$15,987.19 among 394 Sacs and Foxes in Iowa. Each Oklahoma Sac and Fox therefore received a per capita distribution of \$48.60, the result of dividing \$25,615.40 among the 527 in that State. Each Iowa Sac and Fox received a per capita distribution of \$40.57, the result of dividing \$15,987.19 among the 394 Indian participants in Iowa as shown by Exhibit C, page 18 of H. R. 38, being tables officially prepared by the Treasury Department and expressly made competent

evidence of the facts contained therein by Act of Congress. Multiplying the difference of \$8.03 (excluding mills in the calculation) by 394, the number of Indians, gives a difference in favor of claimants for that year of \$3,163.82. In each and every year from 1867 the same tables, supplemented by the unprinted tables from 1900 to date, Exhibits B-2 and C-2 (Rec. 157-158) show the figures necessary to enable the computations to be made of the aggregate loss suffered by claimants. The respective tables show in each year the number of Indians given per capita payments at the respective agencies and the amount distributed in per capita payments. Not having made annual rests and being chargeable like any other trustee, if it pays one *cestui que* trust money it should have paid to another *cestui que* trustment we respectfully submit it is the duty of the court to award claimants the difference representing the aggregate of the several annual losses suffered by the Sac and Fox of the Mississippi in Iowa.

Taking the respective exhibits, and averaging each year's number of Indians by the numbers given for that year in these exhibits, we find the total annuities actually paid appellee Indians from 1867 to 1884, both inclusive, was \$539,405, and the total so paid appellant, \$203,740.32, whereas, on the basis of relative numbers the amount appellant Indians should have received was \$273,652.33, leaving a balance due appellant of \$69,912.01, for which amount judgment is asked under the second claim. It is respectfully submitted therefore (Assignment of Error No. 16), that the court below erred in its Finding of Fact 9.

One matter remains in connection with the foregoing, and that is a contention by appellees that the interpreta-

tion and construction placed on the Act of March 2, 1867, by the Indian Office, was declared correct by Congress which, in the Indian Appropriation Act of March 17, 1882 (22 Stats., 78), enacted: "That hereafter the Sacs and Foxes of Iowa shall have apportioned to them from the appropriations for filling the stipulations of said treaties no greater sum thereof than that heretofore set apart for them." The word "hereafter," we think, evidences the act was not a declaratory one. It was, in fact, repealed by the Act of 1884, hereafter quoted, upon the appellant Indians calling the matter to the attention of Congress and the injustice of the hasty legislation of Congress on an appropriation bill. The view of counsel for appellant, however, is that the Jurisdictional Act makes the whole matter *res integra* and that justice and equity is to be now done on the whole dispute. Therefore the computations have been made on the whole period. In any view of the case it is submitted the Act of 1882 modifies the computations only as to the two years between that Act and the Act of 1884.

THE THIRD CLAIM IS OF THE SAME NATURE AS THE SECOND, ONLY IT RUNS FROM 1884 TO DATE. IT IS TREATED SEPARATELY FOR CONVENIENCE AND BECAUSE OF A CONTENTION THE WORD "ORIGINAL" MODIFIES THE ACT PASSED IN 1867.

In the Indian Appropriation Act of July 4, 1884 (23 Stat., 85), after hearing both sides, Congress provided:

"That hereafter the Sacs and Foxes of Iowa shall have apportioned to them, from appropriations for fulfilling stipulations of their treaties,

their per capita proportion of the amount appropriated in this act, subject to provisions of treaties with said tribes; but this shall apply only to the Sacs and Foxes now in Iowa: And provided further, That this shall apply only to original Sacs and Foxes, now in Iowa, to be ascertained by the Secretary of the Interior."

The contention of appellant is that under the provisions of this act, as under that of 1867, the same amount should be paid each year to each Indian found to come within its provisions and living in Iowa the same amount of annuity, ^{as well as} paid to each Kansas or Oklahoma Sac and Fox; that error of law was committed in making one rest instead of annual rests, because, perhaps of ease of official administration, and that it worked to the prejudice of appellant and denied to each Sac and Fox in Iowa the equal annuity rights to which, under the treaties, he was entitled, and with which treaties the statutes were in consonance and not in discord.

It is conceded in Finding of Fact No. 10 that a fixed numerical proportion was observed between appellant and appellee Indians (Rec. 38) from 1885 to 1907, both inclusive, and this finding is in strict accordance with the record (Rec. 52, 92). The numbers used were 317 Iowa to 505 Oklahoma Indians from 1884 to 1886, inclusive, and 317 Iowa to 513 Oklahoma Indians from 1887 to 1907, inclusive. Under this scheme the total amount paid in these 23 years to appellee Indians, as shown under the head "Per Capita Annuities" (Exhibit B, Rec. 102 and Exhibit B-2, Rec. 157), was \$570,893.72, and the total amount, as shown under the same head to appellant Indians (Exhibit C, Rec. 111, and Exhibit C-2, Rec. 158), was \$364,209.22, whereas, on the

basis of the comparative numbers of each set of Indians, the numbers for each year being averaged where there was more than one annuity payment in any one year, there was due to appellant \$399,116.35, making a balance due on the pro rata basis of \$34,907.13, for which amount judgment is asked on the third claim.

Appellees have advanced the contention that the word "original" is a limitation on the rights of appellant and that the matter left it to the discretion of the Secretary of the Interior to say who the "originals" were. The Court of Claims fell into the same error of law, as applied to the facts of this court, citing in support of its conclusion the Kimberlin and Stephen cases, the former a mandamus to compel enrolment. Had the Secretary of the Interior, in the exercise of his discretion, ascertained the number of appellant Indians each year and then acted, no valid room for complaint would exist. Under the statute his duty would have been to pay annuities to those Iowa Sac and Foxes, and only those, he found embraced within the purview of the provisions of the Act of 1884. But this is not the point of error in the case. The Secretary found, and as the annuity rolls show, actually made payments during this period to more than 317 "original Sac and Fox Indians in Iowa" in almost every year from 1884 to date. This was the result of births to those found in 1884 to be "originals." He made allowances to appellee Indians regardless of deaths. The point of the error is one "rest" instead of "annual rests." The intention of the law in using the word "original" was to limit the right of free migration from Kansas to Iowa and also to prevent "adoptions" if attempted by appellant. Only three such cases as the record (Rec. 53) shows existed and

they were soon eliminated. The "originals," as found by the Secretary, are those found, as to their numbers, in the Iowa list of number of Indians in Exhibits C and C-2.

THE FOURTH CLAIM IS FOR MONEY DUE AT FIVE HUNDRED DOLLARS PER YEAR TO THE PRINCIPAL CHIEF OF THE FOXES FROM 1862 TO 1899, BOTH INCLUSIVE. THE PRINCIPAL CHIEF OF THE FOXES ALL THAT PERIOD WAS IN IOWA.

The Treaty of 1842 (7 Stats., 596; 2 Kappler, 546), by Article 4, provided:

"It is agreed that each of the principal chiefs of the Sacs and Foxes shall hereafter receive the sum of five hundred dollars annually out of the annuities payable to the tribe, to be used and expended by them for such purposes as they may think proper with the approbation of their agent."

The early practice of the Government in its dealings with Indian tribes had been to pay over moneys due under treaties which at first called for only small sums to the chiefs. This power of the purse gave prestige to the chiefs. The money used, however, was money of the whole tribe. It was in no sense personal money of the chief. It was the proceeds of cessions of land belonging to the whole tribe. The chief could use the same for tribal purposes, but not to his own personal aggrandizement. The power of the purse gave a despotic authority to the chiefs inconsistent with the policy

of the United States. By the Treaty of 1842 and by the Act of Congress of 1852 there is manifest a purpose on the part of the United States to take from the power of the Indian chiefs. This, however, could not be done all at once. A middle way was found in Article 4 of the Treaty of 1842 by the provision whereby each chief of the Sacs and each chief of the Foxes should receive annually the sum of five hundred dollars. This five hundred dollars, however, was in no sense more than previously a personal perquisite of the chief. Its obvious purpose was to enable the chief to support such authority, prestige and power as remained in him and is in reality a tribal payment. The claim of appellant, therefore, in the present case, is a tribal claim and within the purview of the Jurisdictional Act.

The facts in the case are that Maw-mew-wah-ne-kah was the principal chief of the Foxes and was so recognized at the time he left the Kansas reservation, as appears (Exhibit A, Rec. 100) by the payment to him in the 4th quarter of the year 1861 of five hundred dollars as chief of the Foxes. This principal chief left the reservation at this time and in 1862 arrived in Iowa with a following of 76 persons, all apparently of the Fox Tribe. The next year the United States undertook to pay the money to Che-ko-skuck and continued for many years to pay the money to various persons in Kansas, some of whom at least admittedly were not even of the Fox Tribe, but were Sacs. The accomplishment of this result, so far as paying it to a Sac chief instead of a Fox chief, was the natural consequence of the dwindling number of the remainder of the Fox Tribe left in Kansas or Oklahoma after the migration of the main tribe to Iowa.

That those in Iowa, while possibly containing a few Sacs, were the Fox Tribe is evidenced early in the Davenport report of 1862 (Rec. 55), the report of Commissioner of Indian Affairs Cooley in 1865 (Rec. 90) and elsewhere. That they constituted a majority in numbers of the Fox Tribe, is conceded by the appellee Indians in the affidavit of their chief, McKosito.

The affidavit says:

"Maw-mew-wah-ne-kah's band was largely of the Foxes. There were but few, if any, of the Sacs. But his band did not embrace all of the Foxes belonging to the Sac and Fox Tribe, but did probably embrace something more than one-half. After Maw-mew-wah-ne-kah left with his families the Foxes remaining in the tribe chose for their chief, Che-ko-skuck, one of their own number, whose selection was confirmed by the council and who remained as the chief of the Foxes on the Kansas reservation, and after the tribe had removed to the Indian Territory, and up to the time of his death. At the time of the death of Che-ko-skuck there had been another organization of the whole tribe and there was no occasion for selecting a special chief for the Foxes or for any special division or portion of the tribe. Che-ko-skuck died on or about 1890. There are now from thirteen to sixteen families of Foxes among those residing on the Oklahoma reservation, and one Fox, Edward Mathews, is a member of the present council."

The census records of the Indians evidence that on an average their family consists of not to exceed one child to each family. On this basis the affidavit of McKosito would indicate that there were not to exceed 50 Foxes re-

maining in Oklahoma, as against a number ranging from 265 to 400 in Iowa. While it is true that the strictly national power and strictly national moneys, for permanent structures, as for schools, blacksmiths and the like, remained on the reservation and to those there, and that a share in the same cannot be claimed by appellant, the Act and Treaty of 1867 entitling them simply to annuities, nevertheless, counsel submit there is good warrant for the assertion of a claim to the \$500 paid annually to the chiefs. Congress recognized this right when, by Act approved May 31, 1900 (31 Stats., 245), it provided:

"That the Secretary of the Interior is directed to pay to Push-e-ten-neke-que, head chief of the Sac and Fox of the Mississippi Indians, located in the State of Iowa, five hundred dollars per annum during the remainder of his natural life, beginning with and including the fiscal year 1900, in accordance with the terms of Article 4 of the Treaty proclaimed March 23, 1843."

It is the contention of appellants that by the Jurisdictional Act the entire controversy between the Indians was remitted to this court for determination of the entire long-standing and bitter controversy, not only between the Indians but between appellant and the Indian Office, which latter consistently regarded the Iowa Sacs and Foxes with hostility, as frankly admitted by Commissioner Leupp (Rec. 75-8), the act meaning as said by this court in *U. S. v. Cherokee Nation*, 202 U. S., 121, "that there were to be no technical defenses set up, no pleas of *res adjudicata*, no releases or relinquishments, compromises or settlements; or it meant nothing." It necessarily, we concede, meant that no one Act of Con-

gress of any named date excluded consideration of any matter prior to that Act of Congress. In other words, that no Act of Congress is declaratory with respect to precedent matters, nor because a future provision was made it asserted or denied the right to go or not to go behind it. The controversy is to be closed in the light of all treaty provisions as modified or not by statute.

Counsel ask for judgment at the rate of five hundred dollars per year from 1862 to 1899, both inclusive, on the fourth claim, that is for \$18,500.

While this amount of judgment is asked, warrant would be had for asking an even larger amount, arising out of the fact, as shown by Exhibit B (Rec. 102), that after the difference within the tribe in 1866, there came a period, beginning with 1870, when those remaining in Kansas, with the assistance of the Government, established two sets of chiefs, one Government chiefs, Ke-o-kuck and Che-ko-skuck, and the other, styled chiefs, their names being Uc-qua-ho-ko and Pah-teck-qua, and divided moneys, sometimes aggregating more than one thousand dollars, equally among these several sets of chiefs until the year 1890 and later.

THE FIFTH CLAIM IS FOR A PRO RATA SHARE, ACCORDING TO COMPARATIVE NUMBERS, OF THE PROCEEDS OF LAND DISPOSED OF UNDER TREATY OF 1859. APPELLANTS RIGHTS NOT BEING FORFEITED APPELLANT HAD AN UNDIVIDED INTEREST IN THE LAND. THE NOTIFICATION REQUIRED BY TREATY WAS NOT GIVEN APPELLANT AND ALL PROCEEDS DERIVED WAS USED FOR EXCLUSIVE BENEFIT OF APPELLEE INDIANS.

By the terms of the Treaty of 1859 (15 Stats., 467; 2 Kappler, 796) provision was made for severalty allotment of part of the reservation and for disposal of the remaining lands with any improvements thereon under direction of the Secretary of the Interior. The purpose of this disposal by the Secretary was stated in the article of disposition as follows:

"Article 4. For the purpose of establishing the Sacs and Foxes of the Mississippi comfortably upon the lands to be assigned to them in severalty, by building them houses, and by furnishing them with agricultural implements, stock animals, and other necessary aid and facilities for commencing agricultural pursuits other favorable circumstances," the remainder of the article relating to sales of land.

Article 5 provided:

"The Sacs and Foxes of the Mississippi being anxious to relieve themselves from the burden of their present liabilities, and it being essential to their best interests that they should be allowed to

commence their new mode of life, free from the embarrassments of debt, it is stipulated and agreed that debts which may be due and owing at the date of signing and execution hereof, either by the said confederated tribes of Sacs and Foxes, or by individual members thereof, shall be liquidated, and paid out of the fund arising from the sale of their surplus lands"—provision being made for inquiry into justice and validity of debts.

Article 6 agreed, the President, with the assent of Congress, "shall have full power to modify or change any of the provisions of former treaties." Article 7 contained the invitation to absentees to reunite with the tribe and enjoy its advantages, with provisions for notification and assistance to the absentees; any not reuniting "within one year from the date of the ratification of this treaty shall not be entitled to the benefit of any of its stipulations." Article 11 contained a provision for payment of moneys heretofore withheld under Article 5 of the Treaty of 1842.

The sworn petition avers (Rec. 9) lack of notification of the provisions of the Treaty of 1859. Acting Commissioner Larrabee, in answer to a call for information under the usual practice of the Court of Claims for papers showing what proceedings were taken as required by Article 7, responded:

"The records of that period are so incomplete as to details that the office is unable to say what, if anything, was done in the matter. An examination, as thorough as could be made at this time, fails to disclose any action of the kind indicated, but this is not conclusive evidence that there was

none, as experience has shown that the old records are not altogether reliable."

Counsel submit those records are *prima facie* evidence and furthermore, that the burden, *vide*, *New York Indians v. U. S.*, is on appellees. The absence of notification finds corroboration in that, so far as counsel have discovered, no report of any Commissioner of Indian Affairs notes any such fact, the claims of appellant were before the Indian Office early in 1863, and Commissioner Cooley, who had up the matter, made no mention of any notification and there is affirmative evidence that notice was given in November, 1866, by the Executive authorities and rescinded by Congress March 2, 1867.

The lands sold under the Treaty of 1859 comprised 268,502.68 acres and the proceeds were \$282,439.27 (Rec. 61), the balance remaining being disposed of under the Treaty of 1867. The amount of debts authorized by the Department to be paid under the Treaty of 1859 was \$157,150.81 (Rec. 60), and adding the interest later paid \$178,715.57. As proceeds from sales of land, under the Treaty of 1859, were not available, "traders scrip" was issued, and in carrying out the provisions of Article 4 that the Indians should be settled in homes and provided agricultural implements and otherwise fitted for an agricultural life \$139,915.55 was expended and provided for by the issuance of "Stevens Improvement Scrip" (Rec. 60). These two classes of scrip with interest, the interest on the traders scrip amounting to \$21,566.76, allowed thereon, absorbed the entire \$282,439.27 and left a balance of \$26,574.59, payment of which was provided in Article 3 of the Treaty of February 18, 1867 (15 Stats., 495; 2 Kappler, 951). In the annual report of the Commissioner of Indian Affairs

for 1865 (p. 549) appears an extensive account, financial and otherwise, of the improvements made and the scrip issued thereunder, from which it appears that the Indians' houses were not finished (p. 550) until May or June, 1862, and that a special agent had reported the houses as "worthless for dwellings" and the ploughing as "leaving the ground in a worse condition for farming purposes than if it had not been touched."

Finally the Sacs and Foxes were again made to move by the Treaty of 1867 to Indian Territory, and then, by one of the so-called Jerome Commission agreements, that of February 13, 1891 (26 Stats., 749), the Oklahoma Indians took lands in severalty and transferred all their remaining lands and rights to the United States for \$485,000. Article 4, the effect of the operation of the Treaty of 1867 and of the agreement of 1900 being to compensate them for their Stevens Scrip improvements. The United States recognized that appellant had an interest in the land and improvements and when the Jerome agreement arrived directed and by supplemental articles, Section 8 of Act approved February 13, 1891 (1 Kappler, 398), there was appropriated and paid \$100,000 "to the Sac and Fox band of Indians now resident in Iowa, in full of all claims of every name and nature which said Indians now have upon the property included in the foregoing agreement of the Sac and Fox Indians in the Indian Territory or upon the United States for the money arising therefrom." In view of this payment, which inferentially is an admission, the requisites of notification and assistance to forfeiture of rights under the Treaty of 1859 had not been given or taken as the treaty required, counsel present no claim for the part of the proceeds of sales of land expended

in paying Stevens Improvement Scrip. They do present a claim, however, with interest for a proportionate part of the \$178,715.57 expended under the Treaty of 1859 in payment of debts. Appellant Indians were not parties to that treaty. None of them, they claim, had any benefit from it. At least 144 of them had left the Kansas reservation five or six years before the treaty was made. In view of the constant complaints embodied in contemporaneous reports of the several Indian agents that the Kansas Sacs and Foxes were suffering from excessive annuities no necessity is seen for such debts. Under the Act of March 3, 1847 (9 Stats., 203), there was issued by the War Department, then in charge of Indian affairs, a regulation forbidding Indian traders from running accounts with Indians to be paid from tribal annuities "unless justified by paramount necessity, and the facts and circumstances rendering their creation necessary be first communicated to the Department and its assent be obtained before any liability whatever be incurred" (Laws, Regulations, Ind. Bureau 1850, pp. 82-85). The lands sold were lands in which appellant had an interest never forfeited. In answer to their calls through the Court of Claims the Indian Office and Interior Department (Rec. 54, 58-62) no evidence has been adduced to show the appellant Indians received any share of this \$178,715.55. They therefore make claim, using as their figures their numbers from 1861, the year succeeding proclamation of the Treaty, to 1866, both inclusive, 185 for the year 1861 and Secretary Hitchcock's average of 225 for the remaining four years and taking as appellees numbers the average number in each year as shown by Exhibit A (Rec. 100). On this basis, which counsel conceives to be the lowest reasonable basis,

the proportionate amount due to appellant, whose numbers aggregate for the period 1185 against 5,937½ for appellee Indians, as shown under the column "No. of Indians" in Exhibit A, is \$28,467.96, for which amount with interest from January 1, 1867, to January 1, 1911, *as per* *Rev. Dep.* at the rate of 5 per cent per annum, the aggregate being \$90,997.47, appellant ask judgment as its fifth *claim claim*.
 Recapitulating, counsel ask judgment as follows:

First claim, forfeited annuities, 1855 to 1866.....	\$104,908.38
Second claim, pro rata share of annuities, 1867 to 1884.....	69,912.01
Third claim, pro rata share of annuities, 1884 to 1907.....	34,907.13
Fourth claim, for chief money, 1862 to 1899.....	18,500.00
Fifth claim; share of proceeds of land sales under Treaty of 1859..	90,997.47
Total.....	\$319,224.99

In conclusion counsel further ask that the decree or opinion of the court may so provide or declare as will ensure to appellant annual "rests" for the future and a pro rata of annuities on the basis of numbers from 1907 until its affairs be finally wound up.

Respectfully submitted,

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Of Counsel.

IN THE
Supreme Court of the United States.

OCTOBER TERM, 1910.

No. 614.

THE SAC AND FOX INDIANS OF THE MISSISSIPPI IN IOWA, APPELLANTS,

v.s.

THE SAC AND FOX INDIANS OF THE MISSISSIPPI AND THE UNITED STATES.

SUPPLEMENTAL AND REPLY BRIEF OF APPELLANT.

In view of the fact that in the briefs of appellees there are misstatements of the position of appellant in the controversy and in the brief of appellee Indians citations from Government reports, said citations being laid before this court for the first time in the pending suit, counsel for appellant desire respectfully to submit a short supplemental brief.

In the brief of counsel for appellee Indians (p. 3), it is stated:

"A great number of straggling, vagabond Indians from other tribes united with the band in Iowa. These were principally Winnebago, Pot-

tawatomie, Omaha, Sioux and Chippewa Indians."

Counsel for appellant respectfully submit that the record discloses no warrant for this statement and that the fact is that their rolls were kept clean and free from enrolment of other than Sac and Fox Indians of the Mississippi in Iowa, so remarkably clean that even the Indian Office, adverse as it is as matter of policy as stated by Commissioner Leupp and as shown by Acting Commissioner Larrabee's recommendation that the Act of Congress be vetoed, when called on, reported through Mr. Larrabee that only three names on the Iowa rolls at any time were regarded as not correctly enrolled, and these three remained on rolls only from 1886 to 1890.

The statement by counsel referred to apparently is based on a report quoted from on page 6 of the brief of appellee Indians. The person making the report was Mr. Enoch Hoag, Superintendent of Indian Affairs for the central superintendency, stationed at Lawrence, Kansas. Counsel for appellant has contended in their brief that statements made in reports by public officials with reference to matters coming within the purview of their official duties are competent evidence as to the facts therein contained. But, it is respectfully submitted that counsel are equally correct in the contention now made that when a public official's report transgresses beyond his official function and undertakes to make statements as to matters outside the boundaries of his jurisdiction, and which statement is of a matter irrelevant to his official duty, his report is, as to such matters, incompetent and irrelevant. The citation from Mr. Hoag's report would tend to mislead the court. The central superintendency did not include the agency of appellant in

Iowa. Mr. Hoag, as his report shows, was in charge of the 90,000 Indians in Kansas and the Indian Territory. He had jurisdiction over the appellee Indians, but appellant Indians were without the boundaries of his jurisdiction. The index to the annual reports of the Commissioner of Indian Affairs for 1867 discloses that for each year, from 1867 to 1873 inclusive, the central superintendency was cited at one part and all the Indians under its supervision enumerated as the Indians in Kansas and Indian Territory, whereas the reports of the agent for the Sacs and Foxes of Iowa, were classified under the designation "Independent Agencies." The prejudice and bias of the superintendent for appellee Indians toward appellant is manifest from the report. Its inaccurate nature appears in its statement of fact that the title to the land purchased by appellant was vested in the United States. It was not until the Indian Appropriation Act of June 10, 1896 (29 Stats., 331), that title vested in the United States, it being originally in the Governor of Iowa (Trans. Rec. 56).

**OFFICIAL REPORTS ESTABLISH THE CLOSE
SCRUTINY AND CAREFUL AND CORRECT
ENUMERATION OF APPELLANT INDIANS.**

The Indian agent in charge of the Sac and Fox Indians in Iowa was A. R. Hombert, whose official report, under date of Toledo, Iowa, September 1, 1873, appears at page 182, Report Commissioner of Indians Affairs for 1873. The agent, whose report is evidence of the official matters with reference to appellant Indians, says:

"In 1846 this united tribe of Indians numbered over 2,000 souls. They then resided on

large tracts of land in Wisconsin and Iowa. These lands were ceded to the United States, and they received in lieu thereof a reservation in what are now the limits of Kansas, and by treaty stipulations they were removed to Kansas, but owing to the great mortality that followed their removal, and other causes, about two hundred and seventy-five of them returned to Iowa. By the sale of some of their ponies they were enabled to purchase and pay for a tract of land located in Tama County, Iowa, containing 419 acres, and by an Act of the Iowa State Legislature they are permitted to remain in Iowa as long as they are peaceably disposed. It is a fact worthy of note here that while that part of the tribe remaining in Kansas and the Indian Territory have, from a variety of causes, rapidly dwindled in numbers, that part of the tribe residing in Iowa have increased in numbers at an equally rapid ratio. The Sac and Fox Indians in Iowa, according to the census just taken, number, men, 86; women, 104; boys, 75, and girls, 70; total, 335; an increase of 18 during last year. It may be proper, however, to state that 5 of these Indians who have had their homes in Kansas or Indian Territory, but who now persist in remaining here, by the advice of the Indian Department, are put on the rolls here. The health of these Indians has been very good, very few deaths having occurred during the past year.

* * * * *

"I recently visited the Pottawatomie Indians residing at Steamboat Rock, Marshall County, Iowa. They are only a small band, numbering about 30 souls. They are farming lands; I believe, successfully, which they have rented of their white neighbors. They desire to locate on lands adjacent to the Indians under my care, that

they may enjoy the benefits of our mission here. There are several bands of Winnebago Indians prowling around, who are almost a constant annoyance to my Indians, committing depredations on their property and stealing their ponies whenever opportunity affords. I have, therefore, thought it best to forbid them mingling with the Indians under my care in future."

It will be noted by the report that five Sacs and Foxes from Kansas had come to Iowa after 1867, but it was by the express direction of the United States that they were placed on the Iowa rolls. They were of the blood of the Sacs and Foxes. The United States, having enrolled them in Iowa when they persisted in refusing to return to Kansas, is clearly estopped in equity to assert they do not come within the provisions of the Act of 1867. In 1873 appellant Indians were receiving a fixed arbitrary amount of \$11,174.66 as their share of annuities based on the census taken of both branches in May, 1867. The Indian Office compelled the Iowa Indians to share this fixed amount, as shown, with five more Sacs and Foxes from Kansas, thereby emphasizing to that extent the injustice done appellant and correspondingly increasing the per capita annuity of each Kansas Sac and Fox.

Counsel for the United States contended, and the court below found that no fixed number were used in the allotment each year from 1867 to 1884 of this regular amount of \$11,174.66 to appellant, but it has been shown a census was taken at the time of each branch of the Indians, and at page 65 of their brief, counsel for appellee Indians concede this census was the basis of annuity allotment, saying :

"These payments were made upon the basis of the number of Indians as ascertained by the Secretary in 1867."

The care that was exercised by the agent of appellant in Iowa, with reference to the rolls of the Sac and Fox Indians in Iowa, and the strictness with which he interpreted the Act of 1867, is shown by the following report of Special Agent Clark, under date of Toledo, Iowa, September 2, 1868 (Ann. Rep. Comsr. Ind. Affs., 1868, p. 306):

"The Sac and Fox Indians of the Mississippi, residing in Iowa, number, according to an enrolment made on the 27th ultimo:

Men	72
Women	87
Children	93

Total	252
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This is a decrease of 14 since my last annual report, but this is accounted for from the fact that in my last report I included 16 Indians who habitually make their home with these Indians, but who I have ascertained to be Pottawatomies, and consequently, are not included in this report.

It appears therefore that there has been a slight increase in numbers during the year.

There are also here from the Sacs and Foxes of Kansas:

Men	2
Women	5
Children	3

Total	10
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They claim to be Foxes, and on account of their near relationship with these Indians, desire very much to make this their home and draw their pay here. Being enrolled in Sac families (as they say), they receive no benefit from the annuities paid in Kansas.

I know nothing of the truth of these statements. Of course, I shall do nothing towards recognizing them as a part of this tribe unless I am directed so to do."

And the following from the annual report of the same agent in Ann. Rep. Comsr. Ind. Affs. for 1869, p. 448:

"The Sac and Fox Indians of the Mississippi, residing in Iowa, number, according to an enrolment made on the 31st ultimo:

Males	122
Females	140
	<hr/>
	262

This is an increase of ten since my last annual report.

There are also ten Indians from the Sacs and Foxes of Kansas, as follows:

Men	2
Women	5
Children	3
	<hr/>
	10

Though I have repeatedly refused to enroll and pay these Indians here, still they refuse to return to Kansas where they can draw their annuities, but persist in remaining and living off of this tribe."

In other words, as the report for 1868 shows, those of Fox blood were not well treated by the predominant Sacs in Kansas, and as they were about the last arrivals in Iowa the agent kept them off the Iowa rolls, but reported the facts. Confirmation of the agents' reports is furnished by the statement of the Auditor for the Interior Department, Exhibit C, made up as it is from the accounts on file, and which accounts necessarily must have included the name of each Indian paid. The increase appearing to 295 in 1870, evidently is in part made up by addition of these ten Indians to the rolls and undoubtedly under orders, just as the decrease in 1868 and 1869 appears by Exhibit C in confirmation of the agent's report.

Counsel for appellant has made his computations by using the official rolls of the United States showing the actual number paid, and consequently, found entitled by the United States. The fixed amount allotted appellant was divided among each of them. If the United States did in fact commit any error in determining erroneously to pay out of the Iowa annuity allotment shares to any who rightfully were Kansas Sac and Fox Indians its error in fact was the exercise of jurisdiction as to the rolls by its own tribunal, the Secretary of the Interior. The record contains no evidence of any such error in fact, but if it did appellant could not be made to suffer thereby.

The brief for appellee Indians is devoted to considerable extent to an argument in favor of the inherent right of appellee Indians to adopt other than Sac and Fox of the Mississippi into the tribe, and in denial of such right to appellant. It would be open to debate perhaps, whether appellee Indians, under the Treaties of 1859 and

1867, could exercise such right without notification to appellant. But appellant believes the sound position is that the annuity payrolls should be taken as they stand. In any event, the concession of appellee Indians could affect only one claim, the third, for the period from 1884 to 1907, and that only to the very slight extent resultant from deducting from the total of appellant Indians from 1885 to 1907 inclusive, three Indians for each year from 1886 to 1890, the burden on this point clearly, on their own view, being on appellees, and the record (Rec. 53) showing only three adoptions about 1886, and these being dropped in 1900. The rolls if corrected as to these three names would reduce appellant's third claim by \$378.52. And as to appellee Indians, pages 52 and 53 evidence, the rolls of appellee Indians contained a much larger number of Indians on the rolls and without any showing that they had been lawfully adopted, so that if appellants' contention as to the acceptance of the annuity rolls for purposes of computation be unsound, the numerical corrections would benefit appellant and increase its third claim. The burden of proof of overcoming the prima facie effect of the official annuity pay rolls clearly is on appellees and they have not impeached them.

THE UNITED STATES IS A REAL PARTY DEFENDANT.

Counsel for the United in their brief assert that the United States is simply a nominal defendant, made so, "not because Congress intended to create any liability against the Government, but in order to comply with the legal requirement that where a suit is brought against

a *cestui que* trust the trustee must be joined as one of the parties defendant." Counsel for appellant are unable to conceive any warrant for such a theory. The jurisdictional act is plain. It evidences no such intention. The act specifically directs an adjudication of the claims of appellant against both the Oklahoma Indians *and the United States*. The United States was a trustee of funds belonging to appellant. It is alleged to have paid those funds to appellee Indians. Both defendants, it is submitted, are on settled principles of equity, liable. It is true Congress, when the matter was before it, passed an Act, which, being vetoed, is of no effect, that directed a transfer of a credit in the Treasury from appellee Indians to appellant. But that act was concededly a compromise. It was an exercise of legislative, not judicial functions. And, when the matter was referred to the courts it was referred for "adjudication as justice and equity might require." The principles of the judiciary now govern, and it is submitted, the United States is a real party defendant and, indeed, as the trustee and dominant personality, whose will was law, should be the responsible defendant.

THE CONTROVERSY JUST AS IT STANDS INCLUDES ALL FIVE CLAIMS. A FINDING OF *RES JUDICATA* WOULD MAKE THE JURISDICTIONAL ACT MEANINGLESS.

Counsel for appellee Indians contend that the controversy is *res adjudicata*. In support of the contention the veto message of the President is set forth with its recommendations for "turning over the whole controversy just as it stands" to the courts. In the light of the fact that

Congress, by reason of the veto message of an appropriation of money to appellants' credit, was apprised to an unusual extent of the merits and facts of the dispute, it is submitted that it would be in derogation of the authority of Congress and of the power vested in the court to hold that the controversy was *res judicata*. Why refer the matter to the courts, or why make an appropriation if the matter had been settled by a preceding appropriation. Counsel for appellant stand on the proposition that the Old Settlers' case in 148 U. S., is apposite and controlling.

Counsel for appellees cite decisions of this court with respect to cases wherein money had been paid and agreed to be accepted in full satisfaction. That is not this case. The Secretary of the Interior was directed to investigate and report conclusions. He investigated and reported a named sum due on a certain account not here involved, and his conclusion was adverse as to certain other claims. Thereupon Congress, in the Indian Appropriation Act passed in 1896 (29 Stats., 331), provided:

"The Secretary of the Treasury is hereby authorized and directed to transfer on the books of the Treasury Department, from the fund of fifty-five thousand and fifty-eight dollars and twenty-one cents, now held for the Sac and Fox tribe of Indians of the Mississippi, the sum of forty-two thousand eight hundred and ninety-three dollars and twenty-five cents to the credit of that portion of said tribe of Indians now residing in the State of Iowa."

This was the amount reported due on one claim. Thereafter the correctness of the Secretary's conclu-

sions as to the other claims was, after differences between the Executive and Congress, referred to the courts. "The whole controversy just as it stands" included all the pending claims, the first three specifically. The fourth is shown, by the Act of 1900, as to the chief, and the fifth claim, instead of being new, was dealt with in a message sent by the President with accompanying papers to Congress (Ex. Doc. No. 172, Senate, 51st Congress, 1st Session), when Assistant Attorney-General Shields held the appellant Indians were entitled to a share in the proceeds of sale of lands through the Jerome Commission, saying:

"By express treaty provisions, as well as by statute, they were permitted to reside in Iowa without forfeiting their rights. Unquestionably the United States could have required the Iowa Indians to reside upon the reservation in Indian Territory and have enforced its commands. 'These Indian tribes are wards of the nation. They are communities dependent upon the United States. * * * The power of the general Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection as well as to the safety of those among whom they dwell' (U. S. v. Kagama, 118 U. S., 384). Such being the relation of the Indian tribes to the United States, it will be quite unnecessary to cite authority to show that the rights of 'its wards' are fully protected and their best welfare fully subserved. This is not done in the provision embodied in the seventh article of said agreement, in my opinion. I am therefore of the opinion * * * that the Iowa Sacs and Foxes have equitable rights in the premises which should be protected."

APPELLEES' COUNSEL ERRONEOUSLY AS-
SUME THE ANNUITY ACT OF 1852
AUTHORIZED FORFEITURES.

Counsel for appellant believe their brief in its statement (p. 59) that the President did not at any time declare the imperious interests of the Indians required payment of annuities otherwise than per capita may be misleading and may be misconstrued into a concession that the Annuity Act of 1852 would have warranted a forfeiture of annuities to appellant had the President in fact so declared. Counsel for appellee Indians apparently so misconstrued the statement in their brief (p. 24). At that point counsel for appellant were discussing the fact and not the law. Appellant insists that the fact of such a Presidential declaration would have had to have been shown affirmatively and that it could not be assumed or presumed from the fact of non-payment of annuities to appellant. It maintains that the contention on the question of proof, as stated in the original brief of its counsel, is correct and that this court has so held in effect in the New York Indian, Sabariego, and other cases cited. But an examination of the terms of the Annuity Act of 1852 would seem to make it clear that, *as matter of law*, that act is not warrant for a Presidential declaration that "the imperious interests" of any Indians require a forfeiture of their annuities. The Executive has no power of forfeiture as Executive. That is nearly always, if not always, a legislative or judicial prerogative. A statute under which power to declare a forfeiture is asserted to be vested in the Executive, would come within the class that are strictly construed. The statute would need to be clear, strong and unambiguous before such a power

would be held to have been made (*N. Y. Indians v. U. S.*, 170 U. S., 1). The statute in question was primarily directed against attorneys or others claiming the right to receive moneys of the Indians. It was authority for payment "otherwise than per capita." The mode of payment, by express declaration, the President might regulate. But no power thereby was vested of forfeiture of the rights secured by treaty stipulation to any Indian or Indians, or tribe or band. Even place of payment was not within its terms. It included merely a right to direct payment to chiefs, headmen, heads of families, etc., in lump instead of per capita.

The treaty stipulations included the whole tribe as beneficiaries in the annuities. The first Annuity Treaty of 1804 did not even require removal of the Indians, but gave a consideration for rights in land. The treaties with the Sac and Fox, whatever may have been the terms of treaties with other tribes, each stated that in consideration of the cession of certain described lands to the United States, the United States agreed to give so much money and to invest the same at a certain per cent. The United States obtained those lands. The treaties, besides and beyond the annuities, agreed to give the Indians lands for a new home. None of the treaties provided directly, or by clear implication, that the right to the annuities given in return for the cession of the land should be dependent on the condition that the Indians should remove to the lands *given in addition to the annuities*. The annuities were part consideration for the lands ceded. The United States obtained the lands. It obtained them from the whole tribe and by treaty with the whole tribe. It became obligated thereby to the various members constituting the tribe, especially after

the Act of 1852 directing per capita payments. The Sacs and Foxes had neither title that required, nor had they any law as did the Five Civilized Tribes, whereby non-residence with the tribe forfeited the rights of the absentees. It would have required treaty or law to have forfeited rights. Custom cannot override law and treaty. The United States frequently, where absentees have reunited with their tribes, have made up to those rejoining the annuities not received during absences, prolonged in many cases. Appellants' present counsel are general attorneys for the Osages and can cite the cases of Peter Revard and the Alberty and Mongrain women as instances.

The case of Mo-ko-ho-ko's band, cited by appellee, comes within a different situation than that of appellant, because Mo-ko-ho-ko came within the express provisions of the Treaty of 1867 providing for a forfeiture of rights of separatists, while appellant comes within the express exception of the treaty.

IOWA'S ASSENT AS TO ALL APPELLANT INDIANS IS APPARENT. ALL ACTS OF CONGRESS MUST BE CONSTRUED IN CONFORMITY WITH TREATIES UNLESS IRRECONCILABLE THEREWITH.

Counsel for appellee Indians (p. 27) have made the assertion repeatedly that some of appellant Indians were not entitled to be in Iowa and did not come within the terms of the Act of the Iowa Legislature or of Congress. The Act of the Iowa Legislature would seem beyond question to be one of license. It cannot in any wise be construed as one of prohibition. Iowa could have raised

objection to any Indians perhaps had she so desired. Her assent and permission for all to remain is shown by Iowa's acts and consistent support of appellant Indians. Permission may be either expressed or implied, and Iowa always has assented to the presence of the Indians, but simply has kept at liberty to regulate them or their numbers against a trespass on her good graces. The matter is immaterial as to the first claim. The Act of Congress of 1857 had nothing to do with forfeiture, and likewise it had neither retroactive nor retrospective effect.

Counsel for appellee Indians insist it was not necessary that annual censuses should be taken under the acts of 1867 and 1884, and that one apportionment for a term of years complies with each of these acts. The treaties and the Annuity Act of 1852 require equality of treatment of all Indians. The Acts of Congress are to be construed in conformity with and not in antagonism to treaties. It was not necessary a census should be taken annually in order to ascertain numbers. One census was sufficient with the additions or deductions to be made and the rolls as so ascertained then to cover births or deaths, and, as to either tribe, adoptions, if they could be lawfully made and were in fact made. Then on this annual basis of numbers annuities of equal amount should have been given every Indian whether in Iowa or in Kansas.

An attack has been made (p. 22 Appellee Indians' brief) on the affidavits filed, on the ground of their correspondence. Each affiant spoke, as the affidavits show, only with reference to the matter of which he was informed. The affidavits were not taken off the Reservation, but at Toledo, Iowa, which is the place given as the location of the Indians in every report of their agent.

An Indian migrating from Kansas to Iowa surely would know the names of those who took part in the migration with him and arrived in Iowa. The affidavits, taken together, clearly show that the roll of the Iowa tribe kept by their Chief was made by getting from each of affiants and perhaps other Indians the names of those who arrived with them. If appellees desired to attack that roll, to question its authenticity or the verity of any of the affidavits, they could and should have examined witnesses. The burden was on them.

At page 37 appellee Indians claim exemption on the score of Article 8 of the Treaty of 1867. It would seem to be perfectly evident from a reading of Article 8 that the claims referred to are those of other persons against the Sac and Fox of the Mississippi tribe, and that the reference is not to any claim by some of the members of the tribe against others of the tribe, or the tribe as an entity.

The reference to the Winnebagos by counsel for appellees is unwise in the light of the fact that the stray bands of Winnebagos had their matter presented to Congress and Congress held that they had not forfeited by leaving their Reservation, and passed legislation making an appropriation to repay them the annuities the Indian Bureau had not paid but had attempted to forfeit.

Respectfully submitted,

CHARLES H. MERILLAT,

CHARLES J. KAPPLER,

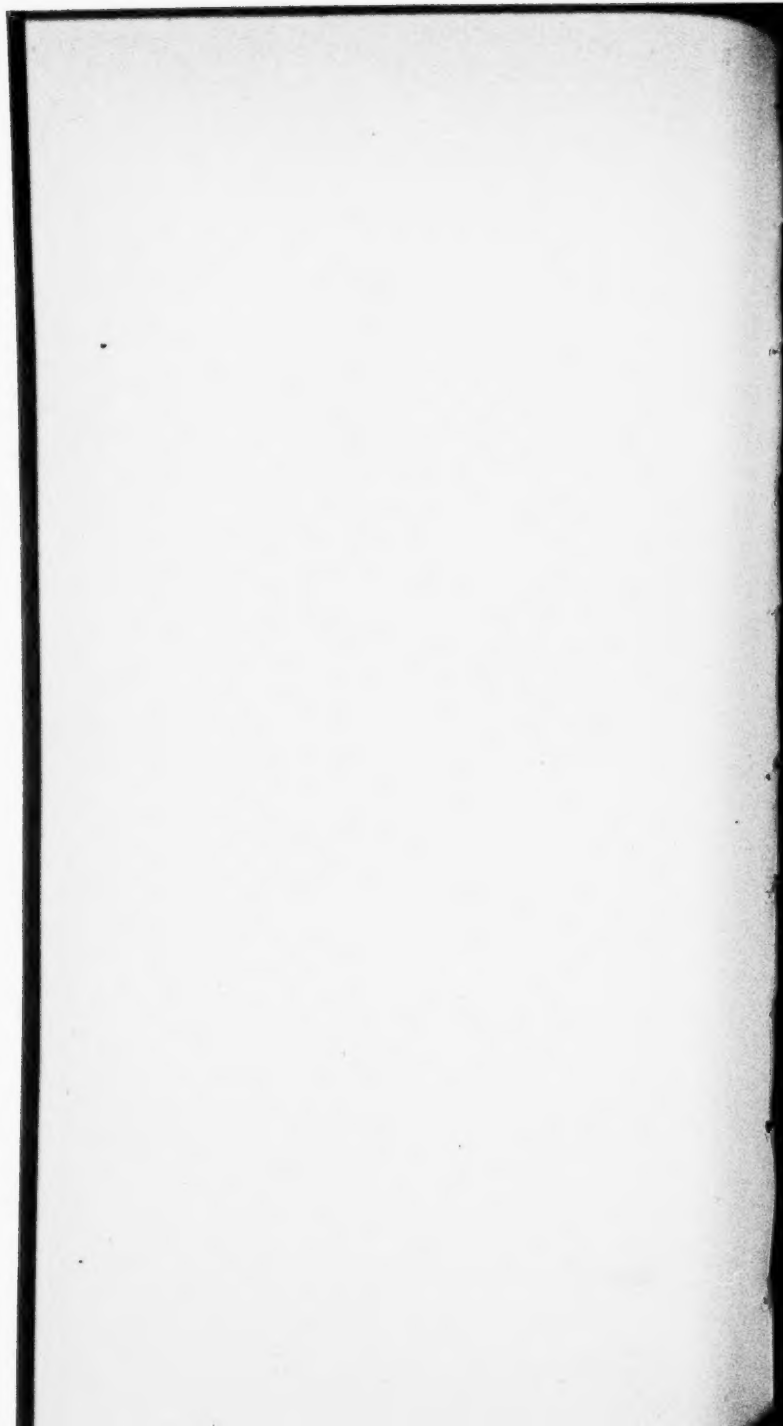
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Office Secretary • U. S.

DEC 7 1910

JAMES H. McKENNEY,

CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 614.

THE SAC AND FOX INDIANS OF THE MISSISSIPPI
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vs.

THE SAC AND FOX INDIANS OF THE MISSISSIPPI
IN OKLAHOMA AND THE UNITED STATES.

**BRIEF ON BEHALF OF APPELLEES, THE SAC
AND FOX INDIANS OF THE MISSISSIPPI IN
OKLAHOMA.**

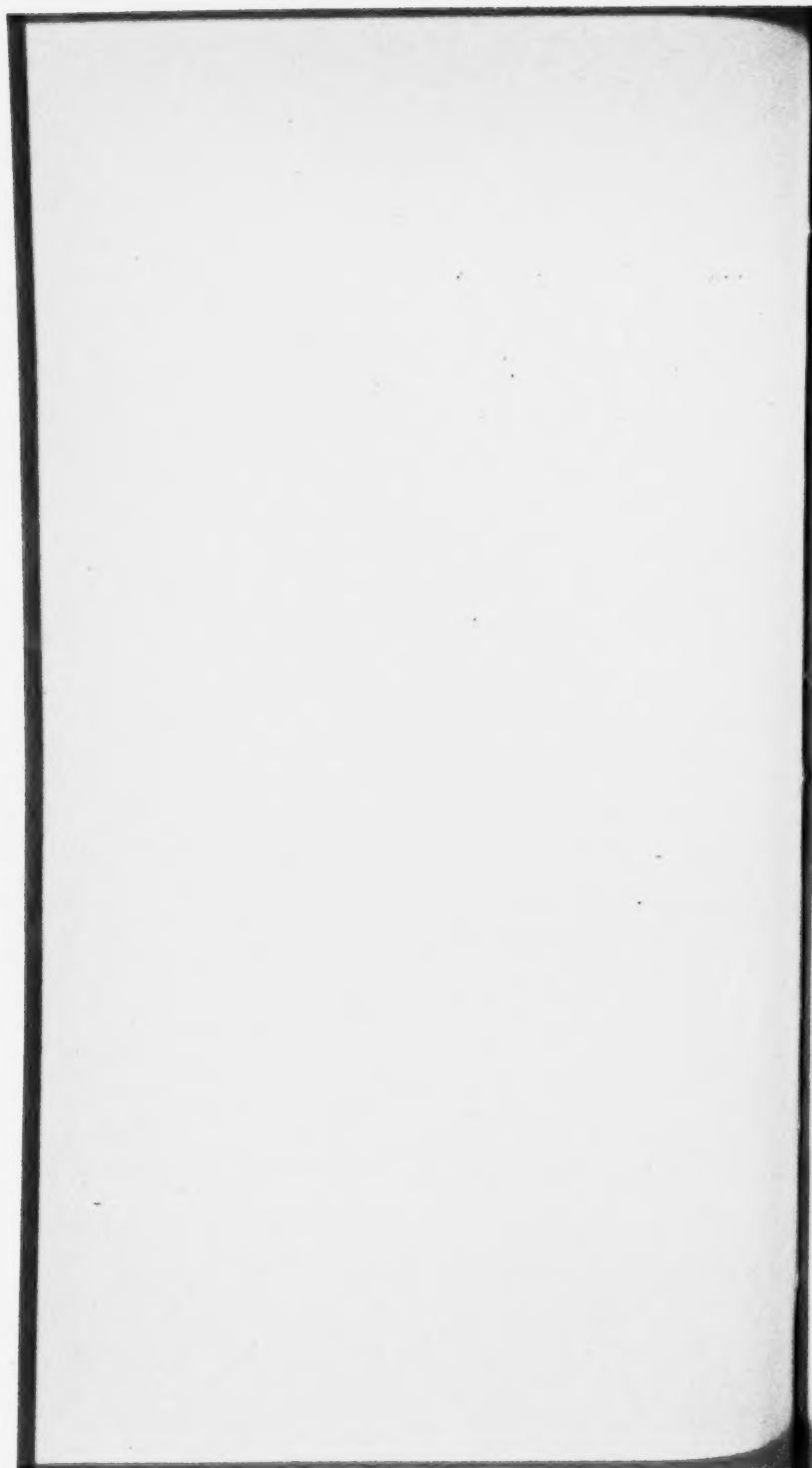
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Of Counsel.



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OKLAHOMA.**

The statement of the case and history of the claims in the brief on behalf of appellants not being in entire accord with our ideas, we beg the indulgence of the court in submitting the following:

STATEMENT.

The Sac Indians and the Fox Indians which had formerly maintained separate tribal organizations united themselves into one tribe during the latter part of the 18th century.

This confederation has continued up to the present time with the exception of a short interval during the War of 1812 between this country and Great Britain.

The Sac and Fox tribe receives the following perpetual annuities:

From the Treaty of 1804.....	\$1,000
From the Treaty of 1837.....	10,000
From the Treaty of 1842.....	40,000
Total annual payment.....	<hr/> \$51,000

In 1850 the Sac and Fox tribe was settled upon their reservation in Kansas to which they had removed from their former reservation in Iowa five years before. The reports of the Indian agents show the existence of progressive and unprogressive parties in the tribe. About the year 1855 a band of the latter left the reservation in Kansas without permission or consent of the Indian agent or other official of the Government and journeyed back to Iowa and there settled upon what had formerly been a part of the Sac and Fox reservation. The band which returned was made up from the ignorant and superstitious and their main object, to use the words of one of their agents, "in selecting this particular locality was the fact that the Indian cemetery where their ancestors, brothers, and children were buried is situated here" (Rep. Com. of Indian Affairs, 1885, p. 108).

In July, 1856, the legislature of the State of Iowa passed an act permitting the Sac and Fox band to reside there, but by its terms this act related only to those who were then in Iowa and it expressly provided that none others should be embraced within its provisions. The band bought a small piece of ground with annuity money which they had drawn prior to leaving Kansas and established themselves thereon. They subsisted by hunting and begging for many years thereafter, as they made but slight advances in agriculture. Subsequent to 1855 and up until about the year 1867 other

Indians left the reservation in Kansas and returned to Iowa. Appellants allege themselves to be either those who thus returned to Iowa or proper representatives thereof.

By the treaty of 1859 the Sac and Fox nation conferred authority upon the President, with the assent of Congress, to change the provisions of any previous treaties in regard to the payment of annuities as might be beneficial to the tribe. As has been shown it is only from treaties previous to 1859 that the annuity moneys are derived.

In the year 1869, pursuant to a treaty entered into in 1867, the main tribe removed from the reservation in Kansas to one which had been assigned to them in Indian Territory, now Oklahoma. The tribe has remained on this reservation ever since.

During the period from 1855 to 1867 there was no Indian agent with the band in Iowa and they were not recognized by the United States in any manner.

In 1867, by treaty and act of Congress, officials of the Government were authorized to pay to the band in Iowa their annuities pro rata according to the number, so long as they remained peaceful and had the assent of the government of Iowa to reside there. The payments were accordingly made as required by the law and treaty.

By the treaty of 1867 it was agreed with the United States that no part of the invested funds of the tribe or moneys which might be due it under previous treaties, or under the treaty of 1867, should be used in the payment of any claims against the tribe which had accrued prior to the treaty, unless expressly provided for therein. None of the claims involved in this case was provided for or mentioned in this treaty.

A great number of straggling, vagabond Indians from other tribes united with the band in Iowa. These were principally Winnebago, Pottowatomie, Omaha, Sioux, and Chippewa Indians.

In 1882 Congress enacted that in the future no greater

sum from the appropriations for fulfilling treaty stipulations should be paid to the Iowa band than had theretofore been set apart for them. This act was interpreted by the Department of the Interior to be a legislative approval of the manner in which it had theretofore distributed annuities and such construction has been uniformly adhered to ever since.

In 1884 Congress directed that the Secretary of the Interior ascertain the number of original Sac and Fox Indians then in Iowa, and that they should be paid annuities in proportion to the number thus ascertained. The Secretary of the Interior had a census taken not only of the Iowa band but also of the main tribe in Oklahoma. This, of course, was necessary in order to arrive at the proper ratio which the number in Iowa was to bear to the whole number of the tribe. The census of the Iowa band showed there were 317 Indians there and that of the Oklahoma band that there were 513. These figures have been used as a basis of apportionment from that time until the present, although the Department of the Interior subsequently ascertained a mistake had been made in the census which resulted in appellants being credited with a much larger number of Indians than they were, under the laws and treaties, entitled to.

On March 26, 1885, appellee Indians, the Sac and Fox Indians of the Mississippi in Oklahoma, duly adopted a written constitution, which *inter alia* declared that they should be called and known as the "Sac and Fox Nation."

Pursuant to the act of March 2, 1895, substantially the same claims as are involved in this cause were examined by the Secretary of the Interior, and his conclusion that the Iowa band should receive from the main tribe over \$42,000 on account of land sold was reported to and acted upon by Congress, such sum being duly transferred to appellants. The Secretary also found that the claim of the band in Iowa that it had been discriminated against in the matter of apportioning annuities since 1855 was without foundation.

All treaties and agreements with the United States concerning the Sac and Fox Indians of the Mississippi have been made exclusively with appellee Indians, the Sac and Fox Nation.

While the motive of the Indians in returning to Iowa, the relative healthfulness of the two locations, and a comparison of the characteristics and habits of the band in Iowa with the main tribe may be lacking in relevancy, we feel, in view of several assertions on these subjects contained in the statement of the case on behalf of appellants, and also because of the bearing generally upon the controversy, that we should invite the court's attention to the following from the reports of the Government's agents.

The agent with the whole tribe in Iowa in 1845 reported:

"I will conclude by observing, that we were unfortunate in the choice of our present location. I doubt if there can be a more unhealthy point within the Territory of Iowa than the site of this agency and its vicinity. In common with nearly all the residents, civil and military, of the place, I, with my family, have suffered severely from diseases of a malarious origin during the last and present summer. Since September 1st, 1844, seventy-nine Indians have died, including Pashepuho, a chief of some note as a warrior."

The year following the tribe was removed to Kansas. In 1852 the agent there in speaking of the country said it "is certainly a healthy one" (Reports of Commissioners of Indian Affairs, 1852, p. 91). In 1857 the agent reports that the "Health has been good within the limits of this agency" (*Ibid.*, 1857, p. 184). In the following year the agent in speaking of the Kansas reservation states that it "Contains some of the finest lands in Kansas Territory" (*Ibid.*, 1858, p. 118). "During the past year the Indians have been remarkably healthy" (*Ibid.*, 1865-'6, p. 563).

In the first report from the Iowa agency the agent points out that "The chiefs and headmen, who ought to see some

of the benefits of civilization, jealously oppose its encroachments among them, at least so far as relates to schools or any kind of mental culture" (*Ibid.*, 1867, p. 347).

In 1868 the agent with the Iowa band speaks of "the determined opposition on the part of these Indians to any encroachment upon their old habits and customs by any form of education or Christian teachings" (*Id.*, p. 306).

The superintendent of Indian Affairs at Lawrence, Kans., in his report to the Commissioner of Indian Affairs in 1873 (*Id.*, 1873, p. 199), says: (*Italics ours.*)

"The Sacs and Foxes are doing better than in any previous year. They have suffered severely in their farming interests by the drought the present season, although they had planted a larger area than usual. In imitation of their Creek neighbors, they are entering upon the raising of stock. The building for school purposes will soon be completed, and their children will then feel the benefit of the ample educational provision of their treaty.

"A portion of the tribe numbering six or eight lodges became exiled from the tribe several years ago, and are now located in Tama County, Iowa. Since their location there, *some Pottowatomies, Winnebagoes and dissolute citizens have amalgamated with them until they number upward of three hundred.* They have purchased about four hundred acres of land—the title vesting in the United States—on which a few of them raise some produce, but insufficient for their support. They subsist mainly as vagrant beggars, and would be amenable to State law on this account if they were citizens. *The Government long ago established a wise provision that fragments of Indian tribes should forfeit their shares of annuities while absent from their proper reservations.* An unfortunate exception was inserted in the Indian appropriation bill of 1868, by which these Iowa Sacs and Foxes are allowed to receive their proportion of annuities so long as they remain peaceable, and have the consent of the State of Iowa to remain within its limits. This exceptional pro-

vision has been continued from year to year, and while the money thus withdrawn might have benefited them had they been with the tribe in the Territory, its effect in their present location has been to increase their habits of vagrancy."

In speaking of this band in Iowa the Commissioner of Indian Affairs in his report to the Secretary of the Interior in 1874 (*Id.*, 1874, p. 32), says:

"They spend about half the year in hunting and trapping and begging among the whites, cling with great tenacity to their old superstitions, and are opposed to schools."

In the report of the Commissioner of Indian Affairs to the Secretary of the Interior in 1875 (*Id.*, 1875, p. 86), in reference to the main tribe in Oklahoma, he says:

"Three-fourths of their subsistence is now obtained by their own labor in civilized pursuits, and no Government rations are issued. They are slow in adopting citizen's dress and in occupying houses; but the building of eight hewn-log houses this year, mainly by their own labor, shows progress in the latter direction. The agency blacksmith is a Sac and Fox Indian. The manual-labor boarding school has an enrollment of forty-nine pupils, and an average attendance of thirty-one."

Of the Iowa band the Commissioner in the same report says, page 86:

"After their removal to Kansas, a small portion of the tribe returned to Iowa, and were allowed to purchase a section of land in Tama County, where they have been from time to time re-enforced by Pottawatomies and Winnebagoes, who were straggling about the country, and have now assumed the name of Sac and Fox. The condition of these 340 Indians is little changed from that reported last year, except that under the application of the labor system they have performed more than usual labor upon their

lands. A school-house has been erected in which a day school is soon to be opened. They are blanket, wigwam Indians, obtaining about one-third of their support by cultivating small gardens and working for farmers, and the remainder by hunting and fishing."

In 1878 the agent in Indian Territory reports that all of the Sac and Fox Indians there, with but few exceptions, are engaged in agricultural pursuits (*Id.*, 1878, p. 68). The same year the agent in Iowa reports that the Indians there farm on but a small scale and still hunt and trap; that they refuse to sign the annuity roll, as they were suspicious there was something to their disadvantage back of it (*Id.*, p. 70).

In 1879 the agent in Indian Territory reports that the Sac and Fox Indians there employ white farmers to work for them (*Id.*, 1879, p. 78).

In 1880 the agent in Iowa says the Indians there still refuse to sign the roll, which requires that they give the names and ages of all their women and children. Of their lands there he says they "will in a short time become very valuable, situated as they are on the line of the Chicago and Northwestern Railroad" (*Id.*, 1880, p. 97).

In 1882, the agent in Indian Territory in reporting on the Sac and Fox Indians there says, "*A more honorable, upright class of Indians would be difficult to find.*" (*Italics ours.*) (*Id.*, 1882, p. 86.)

In the same year the agent in Iowa says of the Indians there, "They oppose every effort made to civilize them, and will not permit their children to be taught in school" (*Id.*, p. 90).

In 1890 the agent in Iowa, who had been among the Sac, and Foxes there for a period of twenty-one years, says, "I can see very little progress among them during that time, as a whole." In the same report he states, "The general appearance of these people today, instead of being one of

thrift and prosperity and intelligence, is one of filth, ignorance, laziness and poverty" (*Id.*, 1890, p. 103).

In 1891 the agent in Oklahoma reported splendid progress in the school (*Id.*, 1891, p. 368), and in the same year the agent in Iowa reported that the school work was very unsatisfactory (*Id.*, p. 253).

In 1892 the agent in Iowa says: "On gala occasions, however, all return to their feathers, paint, and leggins." Again, "They certainly do not intend that their children shall go to school if they can help it" (*Id.*, 1892, p. 264).

In 1893, the agent in Oklahoma makes a splendid report on schools, showing an average attendance of 82 (*Id.*, 1893, p. 264). In the same year the agent in Iowa reports an average school attendance of 10. He urges compulsory education. He reports that they still have the custom of "dog feasts." It is this and their custom in regard to marriage and divorce which he regards as a "great barrier to civilization" (*Id.*, p. 155).

In 1894 the Iowa agent states that he cannot report much progress in the schools (*Id.*, 1894, p. 146).

In 1895, after thirty or forty years of residence on their small reservation, surrounded by the white citizens of Iowa, and constantly urged to decent living by their agents, the same agent is compelled to say, "But two Indians of the tribe may be said to have adopted the citizen dress, and these generally appear with moccasins and not infrequently in the winter with the blanket" (*Id.*, 1895, p. 165).

In 1899, the agent in Oklahoma states that the Indians there are strongly in favor of education and are distinguished for sobriety, morality and strict integrity (*Id.*, 1899, p. 304). In the same year the Iowa agent reports that his Indians are bitterly opposed to education and civilized life and base their opposition upon religious belief (*Id.*, p. 197).

In 1900 the Superintendent of Indian Schools, of the band in Iowa, says:

"Although in the midst of civilization for many years these Indians have made little use of their opportunities and are in almost as primitive a state as were their forefathers, to whose traditions and superstitions they cling with tenacity. This is one of the hardest tribes to civilize.

* * * * *

"These Indians have withstood the teachings of conscientious missionaries and earnest workers under the Government, and are in nearly as barbarous a condition as they were a century ago" (*Id.*, 1900, p. 418).

In *Peters vs. Malin*, 111 Fed. Rep., 244, 246, the defendant was the United States Indian agent with the Iowa band. The opinion was rendered October 21, 1901, and the following facts found by the court are in point here. The court say:

"At the same time Congress appropriated the sum of \$35,000 for the purchase of a site and the erection of the necessary buildings for an Indian industrial school, which was located and erected at Toledo, in Tama County, not upon the Indian lands or reservation, but some four or five miles therefrom. After the erection of the school buildings, efforts were made by the Indian agent and the school superintendent to secure the attendance of the Indian children; but much opposition thereto was manifested by the Indian parents, who evidently became impressed with the idea that the purpose of the school was to convert the children from the Indian modes of thought and living to those of the white men, and therefore the Indians would not consent to the taking of the children from their homes on the reservation and keeping them at the school at Toledo."

In 1904 the agent in Iowa says that "In their social and domestic relations the Indian customs still prevail" (*Id.*, 1904, p. 209).

The characteristics of the band in Iowa and the tribe in Oklahoma may indeed be accurately determined from the above brief review. It also disposes of the often attempted excuse that consideration for their physical well-being induced these recalcitrant Indians to desert their tribe. Indians, certainly at that time, were not seeking health resorts. As the Secretary of the Interior stated, "Their assertion of the unhealthfulness of the new locality has been shown to be a fallacy" (Rec., p. 154). The members of the Iowa band showed their lawless spirit by seceding from the tribe and living there in defiance of law for a period of over ten years. When the Government did act it was through a spirit of charity, for they were in a most pitiable and destitute condition at that time (Rep. Comm'r Ind. Affairs, 1880, p. XXXVII). The loyal Sac and Fox Indians in Oklahoma—the main tribe—constitute the lawful and progressive element of the tribe; those in Iowa the lawless and recalcitrant element. We submit we have historically shown this statement to be true beyond the possibility of contradiction. It is simply inconceivable that the various agents with these two branches of the tribe could have all made unreliable reports for a period of over fifty years.

The petition of appellants was dismissed by the Court of Claims (Rec., p. 47). The findings of fact are on pages 34 to 40 and the opinion of the court on pages 40 to 47 of the record.

Appellants assert that during the period from 1855 to 1867 they were entitled to their pro rata share of the annuities, although absent without permission, and that from 1867 to the present time the basis of apportionment has been one of discrimination against them to the end that they have received less than they are entitled to. In addition the band in Iowa claim they are entitled to a share in the proceeds of certain land sold to the United States pursuant to the treaty of 1859, and also that an alleged chief with them should receive \$18,500 on account of back salary

of \$500 a year. He has not been made party claimant and it is not asserted that this chief, viz: one Push-e-ten-neke-que, was chief during all this period, of 37 years, but on the contrary it is shown that other Indians held the alleged chieftaincy at various times. Just why the particular Indian who claims to be chief at this time should receive the salary for various Indians who claimed to be chiefs in the past is not made clear, even though it were shown that the salary should have been paid to his predecessors.

The total amount for which judgment is prayed is \$454,-215.80, together with interest on a part thereof from an unascertained date.

The defenses of the Sae and Fox Nation to these claims may be briefly summarized as follows:

Appellants are not a legal entity and a judgment in their favor could not extinguish such an indebtedness as is alleged in the amended petition.

From 1855 to 1867, when the Iowa band was absent without permission or recognition the members of such band were not entitled, under the treaties, laws and regulations, to any part or share of the tribal annuity moneys.

The Sac and Fox band in Iowa has already received a far greater proportion of annuity and other tribal moneys during the period covered by these claims than it was entitled to under the laws and treaties.

By the treaty of 1859 the President and Congress have full power to deal with the annuity funds of the tribe in such manner as would be most beneficial to the tribe and hence in the absence of proof of fraud or wanton abuse of this power such action cannot be inquired into.

Under article 8 of the treaty of 1867 none of the moneys belonging to appellee Indians can be used in payment of any claims of appellant Indians accruing prior to 1867.

By the act of May, 1882, Congress and the President stamped with their approval the manner in which the Interior Department had paid annuities to that date and in

effect reiterated such approval in 1884 and that since 1884 the payments have been made by the Secretary of the Interior pursuant to the authority and discretion conferred upon him by the act of Congress of that year, and strictly in accord therewith.

In 1895 the Secretary of the Interior was directed by Congress to examine the claims of the Iowa band and to report his conclusions to Congress. This was done, both sides being afforded full opportunity to be heard. The Secretary found there was due the Iowa band \$42,893.25 on account of land sold, and pursuant to congressional authority this sum was taken from the appellee Indians and credited to appellants. The direction to the Secretary of the Interior by the act of 1895 imposed upon him the exercise of a discretion which in the absence of proof of abuse thereof or fraud cannot now be inquired into by the courts. It is, therefore, *res judicata*.

Even though it should be shown that the claimants had received less than they were entitled to during the period covered by these claims, the United States is liable therefor and not the defendant Indians.

There is a complete and total failure of proof to support any of the claims.

ARGUMENT.

The act of Congress, approved March 1, 1907, by which this controversy was referred to the Court of Claims simply enabled suit to be instituted upon the "claims" therein referred to. The act conferred jurisdiction upon the Court of Claims, with right of appeal to this court, and prohibited the defense of the statute of limitations. There is no concession or admission contained therein that the claims are to any extent meritorious.

While no question can be raised, in construing statutes in regard to the motives alleged to have influenced the minds of the legislature, it is quite proper to show transactions between the legislature and other official departments of the government if light can be thus thrown upon the intention and purpose of the framers of the act under consideration. It is likewise proper to show committee reports on the act and what is popularly spoken of as "The history of the times," in order that the court might be able to possess itself of the facts then possessed by the legislature and thus more accurately divine the intention and results sought to be accomplished. *Church of the Holy Trinity v. United States*, 143 U. S., 459; *Texas & P. R. R. Co. vs. Interstate Commerce Commission*, 162 U. S., 197.

We, therefore, call attention to the following in a letter to the President, dated December 29, 1906, from the Commissioner of Indian Affairs (*Italics ours*):

"* * * I renew my appeal that the bill of last summer be exchanged for a new measure turning over the whole controversy, *just as it stands*, to the Court of Claims, with full power to settle it on the

same lines as would be followed in the settlement of a controversy between two litigants of our own race and of our own capacity for self-defense" (Rec., 78).

On February 20, 1907, Senator Dolliver, of Iowa, introduced Senate Bill No. 8533 to confer jurisdiction upon the Court of Claims to adjudicate these claims. The bill was favorably reported by the Senate Committee on Indian Affairs on the following day (Senate Rep. 7253, 59th Cong., 2d Sess.). In this report it is stated:

"The committee beg leave to refer to the annexed message from the President of the United States in support of the recommendations."

The message of the President therein referred to is as follows (*Italics ours*):

"To the Senate and House of Representatives:

"At the last session I found myself unable to sign House Bill No. 10133, in reference to certain disputed rights between the Iowa and Oklahoma bands of the Sac and Fox Indians. After careful investigation of the subject and on the advice of the Commissioner of Indian Affairs, I recommend that a measure be passed by the Congress *turning over the whole controversy just as it stands* to the Court of Claims with full power to determine the legal and equitable rights involved and to render judgment.

"THEODORE ROOSEVELT.

"The White House, February 19, 1907."

Following the favorable report from the committee the bill was passed by Congress without amendment and approved by the President on March 1, 1907 (34 Stats., Pt. 1, p. 1055). This enactment, which is the jurisdictional act, is set forth in full on page 2 of the record. For the purpose of interpretation and determining the extent of the jurisdiction thus conferred, the act may be read as follows:

"That full legal and equitable jurisdiction, without regard to lapse of time, is hereby conferred upon the Court of Claims to hear, determine, and adjudicate, as justice and equity shall require, * * * all claims of the Sac and Fox Indians of the Mississippi in Iowa, against the Sac and Fox Indians of the Mississippi in Oklahoma, and the United States for money claimed to be due to them as their proportionate shares, according to their numbers, and not heretofore paid to or expended for them, of the appropriations made by Congress for fulfilling treaty stipulations with the confederated tribes of the Sac and Fox Indians of the Mississippi, or arising from the disposal or sale of lands of said confederated tribes, or otherwise, including the claims set out in the Senate Document numbered Sixty-four, Fifty-seventh Congress, first session, for which suit may be instituted in the Court of Claims within ninety days after the passage of this act." * * *

It will be at once observed that the jurisdiction conferred is to hear and adjudicate all "Claims" of claimant Indians for money "Claimed" to be due, including the "Claims" set forth in a Congressional document. Beyond this the act does not go. In *Stewart v. United States and the Osage Nation*, of a similar jurisdictional act, this court said:

"The passage of the act did not imply any admission that there was anything due the claimant. It simply provided for the presentation of his claim to the court and for a decision on the merits, without assuming to say that he had any claim of a meritorious nature" (206 U. S., 185, 194).

It would have been grossly unfair for Congress to have enacted that any defenses, aside from that of limitations, to which appellee Indians were legally entitled as against appellants should not be available. It would be entirely different were the United States the only defendants. So far as appellants and appellee Indians are concerned they stand upon an equal footing in this controversy. The rules con-

cerning the liberal interpretation of statutes and treaties in favor of Indians have no place here.

Delaware Indians *vs.* Cherokee Nation, 193 U. S., 127.

The jurisdictional act being a private act is to be strictly construed.

Charles River Bridge *vs.* Warren Bridge, 11 Pet., 420.

Blair *vs.* Chicago, 201 U. S., 400.

"The act referring the case of Atocha to this court, being a private act, must be strictly construed, and cannot be held to confer any other jurisdiction than that plainly indicated by its terms."

Atocha & Rondero's case, 6 Ct. Cls., 69, 70.

In the jurisdictional act, pursuant to which the case of United States *vs.* Old Settlers (128 U. S., 426) was instituted, it was, *inter alia*, provided:

"It being the intention of this act to allow the said Court of Claims unrestricted latitude in adjusting and determining the said claim, so that the rights, legal and equitable, both of the United States and of said Indians may be fully considered and determined" (25 Stat. L., 694).

In regard thereto this court said:

"The settlement of a controversy arising or growing out of these Indian treaties or the laws of Congress relating thereto, and the determination of what sum, if any, might be justly due under them, certainly does not include a claim which could only be asserted by disregarding the treaties or laws, or holding them inoperative on the ground alleged" (148 U. S., 426, 469).

It was argued on behalf of appellants that the Court of Claims possessed authority under the jurisdictional act to

go into this controversy "*de novo*." Had Congress so intended such intention would have been clearly embodied in the act. For example, in the act conferring jurisdiction in the case of Choctaw Nation *vs.* United States (119 U. S., 1) it was provided that the court might "review the entire question *de novo*, and it shall not be estopped by any action had or award made by the Senate." The radical difference between the effect of the act above quoted and that involved in the case at bar is at once apparent. It is also apparent that by the jurisdictional act the claims of appellants were referred to the Court of Claims just as they stood.

The case at bar, in so far as it relates to claims presented to the Secretary of the Interior under the act of March 2, 1895, is res judicata.

On March 2, 1895, Congress enacted as follows:

"That the Secretary of the Interior be, and he is hereby, directed to examine the claim of the Sac and Fox Indians of Mississippi, now residing in the State of Iowa, as set forth in their memorial presented to Congress (Senate Miscellaneous Document numbered Forty-eight, Fifty-third Congress, third session), for the payment of annuities and other sums from the tribal funds of said Sac and Fox Indians of Mississippi and any and all claims of that portion of the tribe residing in Iowa, and to ascertain whether, under any treaties or acts of Congress, any amount is justly due them as a portion of said tribe from those of said tribe now in Oklahoma by reason of any unequal distribution of tribal annuities, land funds, or funds from other sources; and if so, how much, giving full opportunity to all parties in interest to be heard, and to report his conclusions to Congress at the next assembling thereof" (28 Stats. L., 876, 903).

In appellee Indians' answer to the third paragraph of the amended petition the facts concerning this investigation are

fully pleaded (Rec., 22). The thoroughness of the investigation made by the Secretary of the Interior pursuant to this act is shown by Senate Document No. 167, 54th Congress, 1st session, printed in full in the record, pages 124 to 156. It is there shown that the act was fully complied with, especially in regard to "giving full opportunity to all parties in interest to be heard."

Finding XIII (Rec., 29 and 40) also sets forth the action of the Secretary of the Interior in this regard and discloses that \$42,839.25, the total amount found by the Secretary as due the Iowa band on all of its claims, was transferred to the credit of this band. See act of Congress containing express authority for the transfer of such sum (29 Stats. L., 331). It will be observed from Finding XIII that the claims before the Secretary were substantially the same as those forming the basis of this suit.

Bearing in mind the fact that in the case of *United States vs. Old Settlers*, *supra*, the jurisdictional act provided the court was to have "unrestricted latitude in adjusting and determining the said claim," we submit that the following from the opinion of this court in that case fully sustains the contention of *res judicata*. The principle stated in the case of *Choctaw Nation vs. United States* and quoted and reaffirmed in the *Old Settlers* case is directly applicable in the case at bar. The court say:

"We agree, as was said in the case of *Choctaw Nation vs. United States*, 119 U. S., 1, 29, that where, in professed pursuance of treaties, statutes have conferred valuable benefits upon the Indians, 'which the latter have accepted, they partake of the nature of agreements—the acceptance of the benefit, coupled with the condition, implying an assent on the part of the recipient to the condition, unless that implication is rebutted by other and sufficient circumstances.' And it is also true that when a party, without force or intimidation, and with a full knowledge of all the facts in the case, accepts, on account of an

unliquidated and controverted demand, a sum less than what he claims and believes to be due him, and agrees to accept that sum in full satisfaction, he will not be permitted to avoid his act on the ground of duress *United States vs. Child*, 79 U. S., 360, 363.

"But we think, under all the circumstances disclosed here, that Congress being convinced that a mistake had probably been made in the accounting in a matter which the Indians from the first had called attention to, and desirous, as being the stronger party to the controversy, that that superior justice, which looks only to the substance of the right, should be done in the premises, voluntarily waived any reliance upon lapse of time or laches, and, after attempts on its own part to arrive at a satisfactory result, determined to obtain a judicial interpretation of the treaties and laws bearing upon the subject, and to be bound by judicial decision in respect of the conclusions flowing therefrom, and arrived at upon equitable principles; and that the jurisdictional act passed in effectuation of such intention left it open to the courts to readjust the amount notwithstanding the claim might have been theretofore settled" (148 U. S., 427, 473).'

The acceptance of a sum less than that claimed implies an acquiescence in the entire decision (*United States vs. Adams*, 9 Wall., 554; *United States vs. Child*, 12 Wall., 232).

We submit it clearly appears this controversy was transferred to the Court of Claims just as it stood and that appellee Indians were not deprived by the jurisdictional act of their right to the defense of *res judicata*. We further submit the burden is upon appellants to show the jurisdictional act had the effect claimed by them, and that being a private act it is to be subjected to a strict construction.

Each of the claims is devoid of merit because of the provisions of treaties, laws, and regulations of the Interior Department made in pursuance thereof; and, further, there is a complete failure of proof to support any of the claims.

While it is true, as counsel asserts, this is a case in equity, it is likewise true, as this court said in the case of *Old Settlers vs. United States*, 148 U. S., 426, quoted in appellants' brief, that "* * * in such a case, where an appeal lies and is taken, this court must review the facts and the law *as in other cases in equity* appealed from other courts."

It would be idle, therefore, to maintain binding force for the facts found by the Court of Claims. An examination of these facts, however (Rec., pp. 34 to 40), and of the opinion (Rec., pp. 40 to 47) will disclose that the case was most exhaustively and conscientiously examined by the court below. To ignore the facts as thus found would be contrary to the established practice of this court; to attach to them great weight would be in entire accord therewith.

"This is a case in equity, and while in such a case questions of fact are always open to consideration by an appellate court, great respect is paid to the conclusions of the trial court in respect to them." Mr. Justice Brewer in *United States vs. Detroit T. & L. Co.*, 200 U. S., 321, 329.

To the amended petition (Rec., pp. 1 to 18) the appellee Indians filed a verified answer denying each and every material allegation upon which appellants have predicated their case (Rec., 19 to 33). The burden of overcoming the responsive effect of this answer is upon appellants (*Cochran vs. Blount*, 161 U. S., 350).

The amended petition in effect charges that in the matter of distribution of annuity and other moneys various officials of the Government violated their public duty to the preju-

dice of appellants. In this regard appellants are met by the presumption of the law that public officials do their duty and by the rule that he who alleges such officers to have been derelict bears the burden of proof (*Delassus vs. United States*, 9 Pet., 117; *Phila. & T. R. Co. vs. Stimson*, 14 Pet., 448; *Turner vs. Yates*, 16 How., 14; *Gonzales vs. Ross*, 120 U. S., 605).

There has been no testimony taken in this case. The evidence considered by the court below consisted entirely of reports from the Interior and Treasury Departments and of congressional documents. It was stipulated between counsel for appellants and appellee Indians that certain specified affidavits might be considered by the court with the same effect as if they had been depositions regularly taken (Rec., 87 and 115). Counsel for the United States refused to sign the stipulation and the Court of Claims declined to receive such affidavits as testimony (Rec., 43).

If this court should consider the nine affidavits filed on behalf of appellee (Rec., 115 *et seq.*) as evidence, we invite its attention to the following facts in connection with these several affidavits. Two of them are made by Push-e-to-neke-quā, the alleged chief of appellants' band, who seeks to obtain \$18,500 as back salary.

The affidavits of the seven other Indians which precede that of Push-e-to-neke-quā are by affiants (two of whom are women), whose average age at the time of which they state alleged facts is 16.4 years. The alleged incidents occurred from 34 to 45 years prior to the dates of the affidavits. Two swear that 144 Indians returned to Iowa in 1855; three that 77 returned in 1862; four that 42 returned in 1863; three that 13 returned in 1864; three that 12 returned in 1865 and two that 22 returned in 1866. The youngest affiant was 12 years old at the time concerning which he makes oath, and with the exception of one who was 28 years old the oldest was twenty. The affidavits were all sworn to on the same day, viz., January 29, 1900, before the same

notary public, and it is very apparent were all written by the same person. The same three names appear as witnesses to each of the affidavits. The affidavits are all sworn to by the Indians when away from their reservation, viz., at Toledo Iowa. The most significant fact in their connection, however, is that there is absolutely no variances nor contradictions between them. Considering the lapse of time, the ages of affiants, and other circumstances above noted, we submit that these affidavits are, to say the least, suspicious. Nevertheless, it is upon the figures therein stated that counsel relies to show the alleged number of original Sac and Fox Indians in Iowa between the years 1855 and 1866, inclusive.

As heretofore shown, the annuity moneys received by the Sac and Fox Nation amount to \$51,000 per annum, and that the same is derived from three treaties, viz: of 1804, 1837, and 1842.

Appellants, in support of their first three claims, have placed reliance upon section 3 of the act of August 30, 1852 (10 Stats. L., 41, 56), which was the Indian appropriation act of that year. This section is used to support their contention that it was the duty of the Government to pay annuities to the individual Indians regardless of their presence upon or absence from the reservation assigned to them. The record is replete with evidence to show that the policy of the Government in this regard was at that time, and in fact up until recently, to only pay annuities to Indians when upon their reservations. This was absolutely essential in order that the policy of the United States towards the education of the Indians might be carried out. Indeed, this policy is so well known that it might be claimed to be a matter of history of which this court will take judicial notice. Bearing in mind the contention of appellants as to the effect of section 3 of the act of 1852, we call attention to this entire section, which is as follows:

"And be it further enacted, That no part of the appropriations herein made, or that may hereafter

be made, for the benefit of any Indian, or tribe, or part of a tribe of Indians, shall be paid to any attorney or agent of such Indian, or tribe, or part of a tribe; but shall in every case, be paid directly to the Indian or Indians themselves to whom it shall be due, or to the tribe or part of a tribe *per capita*, unless the imperious interest of the Indian or Indians, or some treaty stipulation, shall require the payment to be made otherwise, under the direction of the President. Nor shall the Executive branch of the Government, now or hereafter, recognize any contract between any Indian, or tribe, or part of a tribe, and any attorney or agent, for the prosecution of any claim against the Government, under this act."

Thus it will be seen that the primary object of Congress in enacting this section, viz: to protect the Indians against unscrupulous attorneys, is immediately apparent. It also put an end to the practice of making payments to chiefs, and thus reduced a more or less despotic influence which they had previously exercised as a result of having payments made to them.

On page 59 of appellants' brief counsel states in regard to the act of 1852:

"The President of the United States did not from 1852 to 1859, or for that matter at any time thereafter, declare that 'the imperious interests of the Indians,' nor did any treaty stipulation require, that payment should be made otherwise than *per capita* to the Sac and Fox Indians of the Mississippi, or that they should not be made to them except upon their reservation."

It will be at once observed that the act does not require that the President shall "declare" anything, but apart from this the actions of the Secretary of the Interior in the premises must be presumed to be by the direction of the President.

There need be no express reference in such actions that they are taken pursuant to the directions of the President.

6 Op. Atty.-Gen. 583.

7 Op. Atty.-Gen. 453.

10 Op. Atty.-Gen. 171.

15 Op. Atty.-Gen. 291.

Wilcox v. Jackson, 13 Pet. (U. S.) 513.

U. S. v. Eliason, 16 Pet. (U. S.) 302.

Confiscation Cases, 20 Wall. 92.

U. S. v. Farden, 99 U. S. 19.

Wolsey v. Chapman, 101 U. S. 769.

Runkle v. U. S., 122 U. S. 557.

U. S. v. Fletcher, 148 U. S. 89.

As was well said by the Court of Claims in *Belt v. United States* (15 Ct. Cls., 92, 107, and 108):

"The action of the Commissioner of Indian Affairs must be presumed to be the action of the President, according to the well-settled principle adopted in practice and recognized by the courts, that the President acts in the performance of most of his duties through an appropriate department of the government and through the chief officers charged with the immediate supervision of the affairs of that department (*Wilcox v. Jackson*, 13 Pet., 498)."

There is certainly nothing in the act of 1852 which would justify the conclusion that individual Indians or bands would be permitted to segregate themselves from their tribes and at the same time not only carry with them the right to receive annuities while absent, but would impose upon the Government the obligation of pursuing them and forcing their share of the annuities upon them. The provisions of practically all the treaties refute the contention of appellants in this regard. An examination of the treaties discloses the fixed purpose of the United States to encourage agriculture by making express provisions for

furnishing the Indians with the means of assisting them in this pursuit. Other provisions, for example, for blacksmiths, houses for the chiefs, manual training school, mission school, and the like, unmistakably and conclusively show that Congress was working out the regeneration of the Indians by keeping them in defined communities, where they would be under the influence of the agent and the teachers, in order that they may be converted from hunters into farmers.

The treaty of 1859 (15 Stats., 467, Kappler, vol. 2, p. 796) affords an illustration of this. It will be recalled that at the time of the making of this treaty appellants alleged that certain members of that band had already gone to Iowa, but that there was a later migration, viz., between 1862 and 1867. By article 6 of this treaty it is, *inter alia*, provided:

“And, in order to render unnecessary any further treaty engagements or arrangements hereafter with the United States, it is hereby agreed and stipulated that the President, with the assent of Congress, shall have full power to modify or change any of the provisions of former treaties with the Sacs and Foxes of the Mississippi in such manner and to whatever extent he may judge to be necessary and expedient for their welfare and best interests.”

Thus the President and Congress obtained by express provisions of a treaty enacted in 1859 full power and authority to change the provisions of any previous treaties in regard to the distribution of annuity moneys in such manner as they saw fit. As has been heretofore shown, it is only from treaty provisions prior to 1859 that annuity moneys are received.

By the act of March 2, 1867, Congress provided “That the band of Sacs and Foxes of the Mississippi now in Tama county, Iowa, shall be paid pro rata, according to their numbers, of the annuities, so long as they are peaceful and have the assent of the government of Iowa to reside in that

State" (14 Stats. L., 507). This act was in accordance with section 21 of the treaty of 1867 (15 Stats., 495; Kappler, vol. 2, p. 951), which authorized the payment of annuities to the Sac and Fox Indians in Iowa.

In view of the provisions of the act of the Iowa legislature, it will be seen that all Indians who returned there from Kansas subsequent to the date of the passage of that act not only violated their obligations to the tribe and the United States, but that they were not included within the terms of the Iowa statute of July 15, 1856, because it expressly provided it should be applicable only to those then in Iowa; and, further, that "none others shall be considered as embraced within the provisions of said act" (Rec., 36).

It will also be noted that Congress by the act of 1867, *supra*, was careful to provide that the Indians in Iowa in order to be entitled to receive annuities must comply with two conditions: first, they must be peaceful; and, second, they must have the assent of the government of Iowa to reside there.

In our statement we asserted in regard to the census made in 1884, pursuant to act of Congress of that year, that the Secretary of the Interior in ascertaining the "original" Sacs and Foxes in Iowa had reported in that census that there were 317 original Sac and Fox Indians then in Iowa. In a letter dated February 3, 1904, from the Honorable Commissioner of Indian Affairs to the Honorable Secretary of the Interior in regard to these claims and the Commissioner states:

"The number as shown in H. R., Document 38, 57th Congress, 1st session, by affidavit in 1855, was 144. This 144, with a very few additions, possibly were in Iowa with the assent of the State government. Note the language of section 2 of the Iowa law, 'but none others shall be considered as embraced within the provisions of said act.' By the affidavit of Pa-ha-she-qua, H. R. Document 38, page 23, the number of Sacs and Foxes in Iowa was 310 in 1866, or

166 more than in 1855 or 1856, and that increased number was living in Iowa in violation of the said law and the act of Congress of 1867, if the construction put on the law by this office is correct. The attorneys for the claimants have laid great stress on the Iowa act, and have quoted so much of it as suited their purpose, but the prohibitory clause has not been touched upon by them. Had this matter been fully presented to the Department when the number was to be ascertained in 1884, it is safe to assume that not only would the Department not have increased the number over that of 1867, but would have reduced it to correspond with the intention of the Iowa act and subsequent acts of Congress, as herein referred to.

"The original Sacs and Foxes in Iowa have, in the opinion of this office, received more than their proportionate share of the funds due the tribes, and have divided with others who were violating their treaties, the laws of Iowa and the United States, and now they memorialize Congress to give them more of the funds of the Sacs and Foxes in Oklahoma, who, by prudence, thrift, and economy have preserved their patrimony undiminished to be eventually put into something substantial and solid, as a future monument to their industry and perseverance, an inheritance to their posterity" (Rec., 72, 73).

In 1882 (22 Stats. L., 78) Congress provided "that hereafter the Sacs and Foxes in Iowa shall have apportioned to them from appropriations for fulfilling the stipulations of said treaties no greater sum than that heretofore set apart for them." In regard to this act the Assistant Attorney General for the Interior Department in an opinion to the Secretary of the Interior said:

"Thus it will be seen that from 1882 to 1885 there could not be paid to the Sacs and Foxes of Iowa any greater sum of money annually than they had received annually prior to that time.

"I am of the opinion also that this act of Congress should be construed as a legislative approval as to the

manner in which the fund had been distributed prior to its date, and that the Sacs and Foxes of Iowa are not entitled to any further sum on this account" (Rec., 92, 93).

We submit the position of the Assistant Attorney General in this regard is clearly in accordance with the intention of Congress in enacting this law.

In 1884 Congress enacted as follows:

"That hereafter the Sacs and Foxes of Iowa shall have apportioned to them, from appropriations for fulfilling the stipulations of said treaties, their per capita proportion of the amount appropriated in this act, subject to the provisions of treaties with said tribes; but this shall apply only to the Sacs and Foxes now in Iowa; and provided further, that this shall apply only to original Sacs and Foxes now in Iowa, to be ascertained by the Secretary of the Interior" (23 Stats. L., p. 373).

In construing the above several enactments the complete and absolute power of Congress in the matter must be borne in mind as conferred by article 6 of the treaty of 1859 heretofore mentioned.

The Commissioner of Indian Affairs in his letter to the Secretary of the Interior of February 3, 1904, in reference to the above act of 1884 and of 1886 said:

"The act providing for readjustment, July 4, 1884 (23 Stats., 85), reads, 'That hereafter the Sacs and Foxes of Iowa shall have apportioned to them, etc. * * * That this shall apply only to original Sacs and Foxes now in Iowa,' etc. * * * The word '*hereafter*' fixes the date when the annuities should be apportioned. After all the clamor of the Iowa branch for back shares, Congress said '*hereafter*,' thereby, so it would appear to this office, impressing its seal of disapproval of prior claims. What did Congress intend by inserting the words '*only to original*'? Was it meant to exclude those who might re-

turn after 1884? Partly so, no doubt, but in framing the act of July 14, 1884, *supra*, it is evident that Congress intended it to be considered in connection with the act of March 2, 1867 (14 Stats., 507), which provided 'that the band of Sacs and Foxes of the Mississippi now in Tamar (Tama) County, Iowa, shall be paid pro rata, according to their numbers, of the annuities, so long as they are peaceful, and have the assent of the government of Iowa to reside in that State.'

"Those who had the assent of the government of the State of Iowa to reside there must be considered the 'original' " (Reg., 71, 72).

An examination of appellants' brief discloses that their entire case rests upon three propositions, each of which we submit is unsound:

1st. That under the act of August 30, 1852 (10 Stats., 56), it was the duty of the Government to pay annuities to individual Indians irrespective of the fact whether they were permanently residing with or apart from their tribe.

2d. That in the case of the New York Indians *vs.* United States (170 U. S., 1) this court held there could be no deprivation of the rights of Indians to annuities on account of absence from their tribe.

3d. That in spite of the desertion of appellants it was necessary for appellees to show there had been a "forfeiture" of their rights in order to successfully defend.

We submit as to the first of the above we have already demonstrated it to be unsound.

The question involved in the New York Indian case was one of forfeiture of *lands*. It is unnecessary to review the various facts in that case. Suffice to say it was asserted on behalf of the United States that the failure of the Indians to move within the five years stipulated in the treaty constituted an abandonment or forfeiture of the reservation. It was not, as in the present case, one between Indians, but an action by the Indians solely against the United States. The

parties were not there, as they are here, upon an equal footing before the law.

The two following extracts from the opinion of the court, we submit, fully disclose the inapplicability of the case to the one at bar:

"The difficult point in the case, in its equitable aspect, is whether the protests of the Indians and their final refusal to remove in 1846 do not estop them from claiming the benefit of the reservation made for them. This is the main defense in the case."

Again:

"But, however this may be, we think the fact that the Government never insisted upon this as an estoppel, and never treated the Indians as having lost their rights in the Kansas lands, is a sufficient answer to the claim of abandonment." (170 U. S., pp. 28 and 29.)

Although the word forfeiture is used by the Secretary of the Interior in regard to the alleged rights of appellants to share in annuities while absent, it is clearly not intended in its strict and technical sense. Forfeiture in this respect relates to land and there must be office found. It is in no possible view applicable to the situation presented in this case. In the usual and ordinary use of words appellants forfeited their right to share in annuities because, contrary to the requirements of treaties, laws and regulations, they failed to comply with one of the conditions precedent, viz: residence upon the reservation.

The first Pan-to-pee case (27 Ct. Cls., 403; 148 U. S., 691) does not conflict with the above because there "The Government by its agents, laws and resolutions of Congress has treated the removal and continued residence in the northern peninsula of Michigan as immaterial * * *." The exact contrary was the fact in the case at bar.

It is shown by appellants' evidence, the several affidavits (Rec., 115 *et seq.*), that the desertions were not in large numbers but straggling members, several families each year, numbers relatively very small in proportion to the whole tribe, and hence there is no significance to be attached to the manner of desertion. But even though the numbers leaving were sufficiently large to put, as counsel contends, the Government upon notice this would result in a situation for which appellee Indians were in no sense responsible and in regard to which they should bear no liability.

In this general view of the case we deem it unnecessary to refer to the fourth and fifth claims relating to chief's salary and share in proceeds of land sold. These will subsequently be separately treated.

Annuity moneys for the support of the National Government of the Sac and Fox Nation and for physician on the reservation must, under the terms of the treaties and law, be paid to such Nation and cannot lawfully be divided with appellants for alleged similar objects.

In the first three claims it is asserted appellants are entitled to share in the funds provided by treaties and laws for the support of the National Government and for physician to the tribe. In order to as far as possible avoid repetition we shall treat of this feature here and eliminate it in our subsequent discussion of the three first claims.

A careful examination of paragraphs XI, XII and XIII (Rec., 12 to 15) and Exhibits A and B (Rec., 100 to 112) will disclose that appellants seek also to recover their share of funds expended for the following purposes on the reservation of the main tribe: Blacksmiths, gunsmith, mission school, supplies of iron, steel, salt and tobacco. Moneys used for the support of the manual training school and several other items are apparently not included.

Disregarding the inconsistency of appellants' position in this regard we shall refer only to the funds used for the National Government and for physician. If appellants are not entitled to share in them *a fortiori* they have no rights in the moneys expended for the other purposes before mentioned.

It is clearly established that appellee Indians constitute the Sac and Fox Nation and that appellants, or some of them, are a band of Sac and Fox Indians living apart from the headquarters of the Nation. With the status of the Indian parties to the suit thus shown it will only be necessary to trace the treaty sources of the money used for the

National Tribal Government and for physician and acts of Congress in relation thereto in order to ascertain if appellants possess the right to share therein.

The first treaty with the Sac and Fox Indians, that of 1804, makes no reference to the use or application of the perpetual annuity thereby provided and, hence, it need not be here considered.

By the eighth paragraph of article two of the treaty of 1837 a perpetual annuity of \$10,000 was provided for (7 Stats., 540; Kappler, Vol. II, p. 495). This paragraph is as follows:

"To invest the sum of two hundred thousand dollars (\$200,000) in safe State stocks and to guarantee to the Indians an annual income of not less than five per cent., the said interest to be paid to them each year, in the manner annuities are paid, at such time and place, and in money or goods as the tribe may direct. *Provided*, That it may be competent for the President to direct that a portion of the same may, with the consent of the Indians, be applied to education, or other purposes calculated to improve them."

It will be noted from the above that the manner of payment was to be "*as the tribe may direct*," and the President was given qualified authority in regard to the application of the funds for educational purposes. It should be borne in mind that this treaty was made about twenty years prior to the separation of claimants from the tribe.

By the treaty of 1842 (7 Stats., 596; Kappler, vol. II, p. 546) an annuity of \$40,000 was provided. The second article is, in part, as follows:

"In consideration of the cession contained in the preceding article, the United States agree to pay annually to the Sacs and Foxes, an interest of five per centum upon the sum of eight hundred thousand dollars."

In the third article it is agreed that "*the tribe will remove to the land so assigned them.*"

The fourth article is as follows:

"It is agreed that each of the principal chiefs of the Sacs and Foxes, shall hereafter receive the sum of five hundred dollars annually, out of the annuities payable to the tribe, to be used and expended by them for such purposes as they may think proper, with the approbation of their agent."

It will be noted that it refers to "the annuities payable to the tribe."

Article five relates to the use of annuity money for *national* and charitable purposes. It states:

"It is further agreed that there shall be a fund amounting to thirty thousand dollars retained at each annual payment to the Sacs and Foxes, in the hands of the agent appointed by the President for their tribe, to be expended by the chiefs, with the approbation of the agent, for national and charitable purposes among their people; such as the support of their poor, burying their dead, employing physicians for the sick, procuring provisions for their people in cases of necessity, and such other purposes of general utility as the chiefs may think proper, and the agent approve. And if at any payment of the annuities of the tribe, a balance of the fund so retained from the preceding year shall remain unexpended, only so much shall be retained in addition as will make up the sum of thirty thousand dollars."

By Article six it is "agreed that the Sacs and Foxes may, at any time, with the consent of the President of the United States, direct the application of any portion of the annuities payable to them, under this or any former treaty, to the purchase of goods or provisions, or to agricultural purposes, or any other object tending to their improvement, or calculated to increase the comfort and happiness of their people."

The treaty concludes as follows:

"In witness whereof, the said John Chambers, commissioner on the part of the United States, and the undersigned chiefs, braves, and headmen of the Sac and Fox nation of Indians, have hereunto set their hands, at the Sac and Fox agency, in the Territory of Iowa, this eleventh day of October, anno Domini one thousand eight hundred and forty-two."

The above-mentioned treaties, those of 1804, 1837 and 1842, are the only treaties from which the annuities are derived. The total is \$51,000 per annum.

The treaty of 1859 (15 Stat., 467; Kappler, vol. II, p. 796) contains two very important provisions. They are as follows. In article six it is agreed:

"And in order to render unnecessary any further treaty engagements or arrangements hereafter with the United States, it is hereby agreed and stipulated that the President, with the assent of Congress, shall have full power to modify or change any of the provisions of former treaties with the Sacs and Foxes of the Mississippi in such manner and to whatever extent he may judge to be necessary and expedient for their welfare and best interests."

Article seven provides:

"The Sacs and Foxes of the Mississippi, parties to this agreement, are anxious that all the members of their tribe shall participate in the advantages herein provided for respecting their improvement and civilization, and to that end to induce all that are now separated to rejoin and reunite with them. It is therefore agreed that, as soon as practicable, the Commissioner of Indian Affairs shall cause the necessary proceedings to be adopted to have them notified of this agreement and its advantages, and to induce them to come in and unite with their brethren; and to enable them to do so, and to sustain themselves for a reasonable time thereafter, such assistance shall be provided for them at the expense of the tribe as

may be actually necessary for that purpose: *Provided, however, That those who do not rejoin and permanently reunite themselves with the tribe within one year from the date of the ratification of this treaty shall not be entitled to the benefit of any of its stipulations.*"

It is by the treaty of 1867 (15 Stat., 495; Kappler, vol. II, p. 951) that the definite provisions are made for the national Government and physician, a share of which, it is claimed should be each year paid to claimants. It is also by this treaty that the reservation in Oklahoma was ceded to the tribe.

The following provisions of the treaty clearly show the intention of the parties in regard to the advancement and education of the members of the tribe and also that it was the Sac and Fox tribe which was being dealt with. It should be remembered that at this time there were approximately 715 members of the tribe in Kansas where the treaty was made and about 264 in the band in Iowa. These figures are from the reports of the agents.

Article 7 of the treaty of 1867 provides:

"As soon as practicable after the selection of the new reservation herein provided for, there shall be erected thereon, at the cost of the United States, a dwelling-house for the agent of the tribe, a house and shop for a blacksmith, and dwelling-house for a physician, the aggregate cost of which shall not exceed ten thousand dollars; and also, at the expense of the tribe, five dwelling-houses for the chiefs, to cost in all not more than five thousand dollars."

Article 8 is as follows:

"No part of the invested funds of the tribe, or of any moneys which may be due to them under the provisions of previous treaties, nor of any moneys provided to be paid to them by this treaty, shall be used in payment of any claims against the tribe ac-

cruing previous to the ratification of this treaty unless herein expressly provided for."

Article 9 provides for the manual training school, national government, and chiefs. As it is important in its bearing upon this feature of the case, we quote it in full:

"In order to promote the civilization of the tribe, one section of land, convenient to the residence of the agent, shall be selected by said agent, with the approval of the Commissioner of Indian Affairs, and set apart for a manual-labor school; and there shall also be set apart, from the money to be paid to the tribe under this treaty, the sum of ten thousand dollars for the erection of the necessary school buildings and dwelling for teacher, and the annual amount of five thousand dollars shall be set apart from the income of their funds after the erection of such school buildings, for the support of the school; and after settlement of the tribe upon their new reservation, the sum of five thousand dollars of the income of their funds may be annually used, under the direction of the chiefs, in the support of their national government, out of which last-mentioned amount the sum of five hundred dollars shall be annually paid to each of the chiefs."

This provision for the pay of chiefs clearly supersedes article IV of the treaty of 1842, *supra*.

The above-quoted ninth article of the treaty was originally not in this form. It was amended by the Senate. On pages 73 to 75 of the record an opinion of Assistant Attorney General Hall, dated September 23, 1895, will be found setting forth the original draft of this section. This opinion is significant in that it holds that the provisions of this article must be strictly complied with, viz., the money must be used for the support of the national government of the tribe.

The object of this article is set out in its first phrase: "*In order to promote the civilization of the tribe.*" The means

were that there should "*be set apart, from the money to be paid the tribe,*" certain sums for specified objects, which objects were to be carried out *on the reservation*. Words could not make plainer the facts that the *tribe* was being dealt with, what the objects of these provisions were, and the method and place of carrying them out.

The tenth article provides that "The United States agree to pay annually, for five years after the removal of the tribe, the sum of fifteen hundred dollars for the support of a physician and purchase of medicines," etc.

Although this provision expired by its own limitation after five years it has been continued by Congress each year thereafter to the present time. That Congress possessed this power can hardly now be denied. (Article six of the treaty of 1859, heretofore quoted; see also *United States vs. Western Cherokees*, 148 U. S., 427.)

The Secretary of the Interior on January 30, 1896, in reporting upon the claim of the Iowa band for a share in the fund of \$1,500 for physician, said:

"The Sacs and Foxes of Iowa also claim that the \$1,500 which Congress has provided annually since 1875 should be set apart for the payment of a physician and the purchase of medicines, should not be deducted from the annuities before distribution among the Indians, but that said amount should be charged to the Sacs and Foxes of Oklahoma.

"I find in the first act of Congress in which appropriation was made for this purpose the following language: 'of which sum one thousand five hundred dollars shall be paid for a physician for the agency, who shall furnish the necessary medicines.' (Act of June 22, 1874, 18 Statutes, 163.)

"Congress in express terms directed that 'of this sum,' meaning of the \$51,000 appropriated, \$1,500 should be paid for a physician for the agency, who shall furnish the necessary medicine. It is very evident that said amount was to be taken from the gross sum appropriated, and that the appropriation was

for the benefit of the Sacs and Foxes on the reservation set apart for that tribe under the treaty of 1868.

"In some of the subsequent acts making annual appropriations for this purpose the language of the original appropriation is changed, but there is not such a change of language as would indicate a change of intent on the part of Congress" (Rec., 93).

Article twenty-one of this treaty to which reference has been before made, is exceedingly significant in this regard. It conclusively shows that the band in Iowa was not overlooked. This band was bound by all the provisions of the treaty and had one exemption in their favor, viz., they were given the privilege of receiving their share of the annuities, although in Iowa. We repeat this article:

"The Sacs and Foxes of the Mississippi, parties to this agreement, being anxious that all the members of their tribe shall participate in the advantages to be derived from the investment of their national funds, sales of lands, and so forth, it is therefore agreed that, as soon as practicable, the Commissioner of Indian Affairs shall cause the necessary proceedings to be adopted to have such members of the tribe as may be absent notified of this agreement and its advantages, and to induce them to come in and permanently unite with their brethren; and that no part of the funds arising from or due the Nation under this or previous treaty stipulations shall be paid to any bands or parts of bands who do not permanently reside on the reservation set apart to them by the Government in the Indian Territory, as provided in this treaty, except those residing in the State of Iowa; and it is further agreed that all money accruing from this or former treaties, now due or to become due said Nation, shall be paid them on their reservation in Kansas; and after their removal, as provided in this treaty, payments shall be made at their agency, on their lands as then located."

It will be seen that the Indians in Iowa were in the future to receive there a proportion of the annuities. To construe

this treaty, as contended for by claimants, would mean that the parties thereto by article twenty-one had changed article seven and nine to mean that there would be two dwelling-houses for two agents, two blacksmith shops, two dwelling-houses for two physicians, ten dwelling-houses for chiefs, two manual-training schools, two national governments and two physicians, etc., one-half of each of the above to be in Iowa, the other half to be in Indian Territory. In addition to this the frequent references to "*the tribe*" and to "*the reservation*" in the treaty of 1867 would render the entire treaty meaningless.

Congress enacted in regard to the Iowa band on March 2, 1867, as follows (14 Stat., 507):

"Provided, That the band of Sacs and Foxes of the Mississippi now in Tama County, Iowa, shall be paid pro rata, according to their numbers, of the annuities, so long as they are peaceful and have the assent of the government of Iowa to reside in that state."

The twenty-first article of the treaty of 1867 has been uniformly construed in the manner contended for by appellee Indians. The first claim made by the Iowa band for the privilege of sharing in the funds for support of national government and physician is in the memorial filed in the Senate on January 14, 1895 (Sen. Misc. Doc. 48, 53d Cong., 3d sess.). The interpretation placed upon article twenty-one of the treaty of 1867 at the time by the parties thereto is entitled to great weight. The interpretation made in 1867 has been the uniform interpretation by the Government and the Sac and Fox Nation ever since. It was twenty-eight years after the treaty of 1867 that the Iowa band, through its attorneys, first took exception to this construction of the treaty.

In *Eastern Band of Cherokees vs. The United States and the Cherokee Nation* (20 Ct. Cl., 449) the Chief Justice in speaking for the court said (p. 477):

"Thus we have a contemporaneous construction by all parties concerned of the meaning of the treaty of 1835-36, which excludes the present claims."

The claims were held to be without merit. The following is from the same opinion (p. 478):

"If, however, the whole 'Cherokee' there mentioned included the North Carolina Cherokees, the very language repels the idea of any partition between them. To enjoy the benefit of the common lands they must go and enjoy the same with their brethren, according to the customs, laws, and usages of the nation. There is not a single word in either of the treaties that implies a partition of lands or a division of the funds of the Cherokee Nation. All is distinctly either declared or implied to be 'in common.' In clear violation of the idea of common property, the present claimant is seeking a division of it."

On March 2, 1895, it was enacted that the Secretary of the Interior should examine all the claims made by the Iowa band up to that date (28 Stat., 876-903) and report thereon to Congress. Their second claim as then set forth was as follows:

"For their just proportionate shares of the tribal annuities for the period from 1867 to 1894, both inclusive, allowing them for said period their proportionate share of the \$5,000 for support of manual-labor school, of the \$5,000 for national government of the tribe, and of the amount used for physicians and medicines, the amount of this item of their claim will be about \$157,183.45" (Senate Doc. 167, p. 3; Rec., p. 126).

The Secretary in his adverse report on this claim quoted from a similar report of Secretary Lamar dated June 1, 1886, in part as follows:

"The treaty was made with the tribe, and all of the

several bands or classes composing the tribe are bound by its provisions" (Rec., p. 133).

Again—

"To what extent, then, are the Sacs and Foxes living in the State of Iowa excepted from the obligation of the treaty? Simply this: Their right to remain in Iowa is recognized, without forfeiting their right to share in the common fund. No bands or parts of bands who do not reside on the reservation shall be paid any part of said fund, except those living in the State of Iowa. This is the sole exception in their favor; but they are equally bound by the treaty stipulation, providing that from the common fund shall be deducted the amount specified for the support of the school and the national government. If it was not intended that the sum so provided to be set apart annually from the income of their funds should be deducted from the common fund before distribution, why not have said that there shall be apportioned among the Sacs and Foxes of the Mississippi their proportion of the amount appropriated by this act, and from the amount so apportioned and due to the Sacs and Foxes living on the reservation there shall be set apart the sum of \$5,000 for the support of the school and \$5,000 for the support of the government? But if there is any question as to the construction of this treaty in reference to the proper disposition of this fund, the act of 1885 (23 Stat. L., 373) making appropriations for the Sacs and Foxes of the Mississippi removes all doubt. That act appropriates \$51,000 for the said Indians, and provides that the sum of \$1,500 shall be used for pay of a physician and medicine for the use of said Indians. It also provides that hereafter the Sacs and Foxes of Iowa shall have apportioned to them, from appropriations for fulfilling the stipulations of said treaties, their per capita proportion of the amount appropriated in this act, subject to provision of treaties with said tribes: * * * that this shall apply only to the original Sacs and Foxes now in Iowa * * * " (Sen. Doc. 167, p. 8; Rec., pp. 133 and 134).

Upon this report Assistant Attorney-General Hall in an opinion addressed to the Secretary of the Interior bearing date of December 23, 1895, said:

"The memorialists also set up the claim that the \$10,000 which the treaty, approved October 14, 1868, provides shall be set apart for the maintaining of schools and for the maintaining of tribal government should not affect their shares of the annuities. That is to say, that the aggregate annuities, to wit: \$51,000, should be divided *pro rata* among the Sac and Fox of Iowa, as well as the Sac and Fox of Oklahoma, without any deduction on account of maintaining schools and the tribal government of the Oklahoma Sac and Fox Indians.

"I do not think this contention is sound. This matter was, in my judgment, properly disposed of by Secretary Lamar in a letter addressed to the Commissioner of Indian Affairs, on June 1, 1886, in which he decided that the \$10,000 should be deducted from the \$51,000, and the remainder distributed" (Rec., p. 93.)

In this same opinion Assistant Attorney-General Hall refers to the act of May 17, 1882, which act, being in harmony with the opinion is, we submit, decisive of the claims for national government and similar funds, as well as for a greater share in the *pro rata* annuities. The Assistant Attorney-General says:

"I find that an act of Congress approved May 17, (1882, 22 Stat., 78), provided, "That hereafter the Sac and Fox of Iowa shall have apportioned to them from appropriations for fulfilling the stipulations in said treaties no greater sum thereof than that heretofore set apart for them." Thus it will be seen that from 1882 to 1885 there could not be paid to the Sac and Fox of Iowa any greater sum of money annually than they had received annually prior to that time.

I am of the opinion also that this act of Congress should be construed as a legislative approval as to the

manner in which the fund had been distributed prior to its date, and that the Sac and Fox of Iowa are not entitled to any further sum on this account." (Rec., pp. 92 and 93.)

This act was followed by the act of July 4, 1884 (23 Stats., 85), as follows:

"That hereafter the Sacs and Foxes of Iowa shall have apportioned to them, from appropriations for fulfilling the stipulations of said treaties, their per capita proportion of the amount appropriated in this act, subject to provisions of treaties with said tribes; but this shall apply only to the Sacs and Foxes now in Iowa; and *provided further*, That this shall apply only to original Sacs and Foxes now in Iowa to be ascertained by the Secretary of the Interior."

The words "subject to the provisions of treaties with said tribes" are very significant, being followed as they are by the proviso that the act "shall apply only to original Sacs and Foxes now in Iowa." They clearly show that Congress was proceeding carefully both as to allowing part of the annuity money to go to the band in Iowa and also as to the Indians there who were to share in the same.

The treaty provisions which we have quoted and also the acts of Congress stand to day as fully in force as they did when then went into effect. There have been no repeals, express or implied, but on the contrary there has been an unbroken departmental interpretation and action thereunder entirely in harmony with our contentions which has never been modified or disturbed by Congress. Each year Congress has enacted laws relating to these Indians yet there has never once been the slightest reference to a disapproval of the interpretation and practice of the Department of the Interior.

"The weight to be given to departmental practice is greatly increased when Congress, in re-enacting the law, fails to indicate in any way its disapproval of the

settled construction, to which it is thus regarded as giving an implied approval." (21 Opin. Atty-Gen., 408, 410.)

See also *United States vs. Alabama G. S. R. R. Co.*, 142 U. S., 615.

The agreement between the Sac and Fox Nation and the United States, which was ratified by Congress February 13, 1891, set forth in 26 Stats. L., 749, shows by the terms of Art. I, p. 751, and Art. IV, p. 752, that the United States expected the National Council of the Sac and Fox Nation to continue in existence and that the tribal government was to continue as before. The agency is by the terms of the first article of the agreement to be retained. It would require affirmative action to discontinue the tribal government.

We submit we have shown the unsoundness of contentions on behalf of claimants to share in funds for the purposes of support of the national government and physician and likewise in funds expended by the United States for blacksmiths and for other purposes previously mentioned.

Appellee Indians, the Sac and Fox Nation, possess and have always possessed the inherent right of adopting other Indians into full membership in the tribe, while appellants have never possessed such right.

In brief on behalf of appellants, counsel questions the right of appellee Indians to adopt other Indians into full membership in the Nation.

There does not appear to have ever been any express provision of the Regulations of the Indian Office authorizing Indian tribes to acquire members by adoption, but the Regulations recognized the existence of the right. The lawful authorities of the tribes possessed this right inherently. We

shall presently show that the courts have also recognized the existence of this right. Section 87 of the Regulations of 1880 is as follows (*italics ours*):

"Citizens or persons not Indians, *who have not been adopted by the tribal authorities*, have no legal status in an Indian tribe unless they are specially provided for by treaty or special act of Congress, and cannot therefore share in any annuities paid to an Indian tribe."

Section 327 of the Regulations of 1904, which are now in force, provides (*italics ours*):

"Persons not Indians, *unless adopted by the tribal authorities*, which adoption must be approved by the Department and the Indian Office to be valid, or unless they are specially provided for by treaty or act of Congress, have no legal status in an Indian tribe and cannot share in any annuities paid to said tribe."

The facts that the defendant Indians are the Sac and Fox Nation and that as such they possess the right of adoption are both recognized in the most recent agreement made with them. (See 26 Stats., 749; Kappler, vol. I, p. 389.)

The recital of this agreement is as follows:

"Articles of agreement made and entered into at the seat of government of the Sac and Fox Nation in the Indian Territory on the twelfth day of June, eighteen hundred and ninety, by and between David H. Jerome, Alfred M. Wilson and Warren G. Sayre, commissioners on the part of the United States, appointed for the purpose, and the Sac and Fox Nation, witnesseth."

The seventh article of the agreement provides (*italics ours*):

"It is further agreed that the beneficiaries of this agreement shall be limited to those persons whose names are now on the rolls as Sacs and Foxes at the said Sac and Fox agency; and those that may be

born to them, and entitled by the laws and customs of said Sac and Fox Nation to go upon said roll before said allotments are made; *and those that may be adopted into said Nation according to law by the National Council, before said allotments are made.*"

By reference to page 53 of the record it appears that twenty persons have been adopted into membership of the Sac and Fox tribe by the defendant Indians.

The act of July 4, 1884 (23 Stats., 85), especially the proviso thereof, is pertinent so far as any rights of appellants in this regard are concerned. It is as follows:

"That hereafter the Sacs and Foxes of Iowa shall have apportioned to them, from appropriations for fulfilling the stipulations of said treaties, their per capita proportion of the amount appropriated in this act, subject to provisions of treaties with said tribes; but this shall apply only to the Sacs and Foxes now in Iowa: *And provided further, That this shall apply only to original Sacs and Foxes now in Iowa to be ascertained by the Secretary of the Interior.*"

We respectfully submit that this act prohibited *appellants* from adopting Indians who would be entitled to share in annuities. It says it shall "apply only to *original* Sacs and Foxes now in Iowa." The wisdom of Congress in passing such act is perfectly obvious. If a band of recalcitrant and disgruntled Indians were permitted to leave the tribe, designate themselves the real tribe, and adopt to membership such Indians as they saw fit, it would prove a very simple and effective method of depriving the main loyal tribe of a large proportion of its annuities.

That appellee Indians possess the right of adoption and appellants do not is, we submit, clearly proven. If wanton abuse of the right of adoption on the part of the defendant Indians is to be presupposed, then apparent injustice might result to appellants. There has been no such abuse, for there have only been twenty Indians adopted. In considering

this subject it must not be overlooked that the condition is one which has resulted solely from the deliberate defiance and opposition by appellants to the wishes and beneficent purposes of the Government.

The situation is not an unprecedented one.

In the case of *Delaware Indians vs. Cherokee Nation*, 38 Ct. Cl., 234, it was averred in the petition that in violation of the rights of the Delaware Indians the Cherokee Nation had admitted other persons not Cherokees to share in the lands and funds of the Cherokee Nation, and thereby diminished the share which the Delawares were entitled to have and receive in such lands and funds of the Cherokee Nation, and for which they paid their money. To that allegation it was insisted by the defendants that whatever had been done had been in accordance with and by virtue of the sovereign powers of said Nation, properly and legally exercised under the laws of the Nation, and that the Delawares had no right to complain. It was insisted by the defendants that the court had no right to determine how many persons had been so admitted to the Cherokee Nation.

The court sustained the contentions made on behalf of defendants. At page 255 the court say:

"Being clothed with the characteristics of a distinct political community, the Nation must have incident to it the right and power to admit to citizenship such persons as it may desire, and, being admitted to citizenship, they partake of all the rights of a citizen in a political sense and an equality in common with the other citizens in property and funds of the body politic."

When the case was heard by this court (193 U. S., 127) the same contention on behalf of defendants was made and that there had been maladministration of the financial affairs of the Cherokee Nation to the detriment of the Delawares. The court, after sustaining the right of the Cherokee Nation to adopt citizens to full membership, say:

"We are authorized by the enabling act to determine the contractual rights of the Delawares in the national lands and funds; not to overhaul the political and administrative action of the Cherokee Nation."

Attention is also invited to article 14 of the treaty of 1867 (15 Stat., 495; Kappler, vol. II, p. 951), by which it was agreed that the Sac and Fox Indians of the *Missouri* might unite with Sac and Fox Indians of the *Mississippi*.

We submit it is entirely plain that the right of adopting Indians to membership in the tribe is an inherent one possessed by the Sac and Fox Nation of the exercise of which appellants cannot be heard to complain, and further that appellants do not and never have possessed such right.

First Claim.

This claim is for a full proportionate share of annuities to certain Indians who between the years 1855 and 1867 left the reservation of the tribe in Kansas without permission or authority from either the United States or of the tribe and returned to their former reservation in Kansas. The claim is stated on page 12 of the record, paragraph XI of the amended petition, from which it appears \$125,647.96 are alleged to be due appellants on this account, although counsel in his present brief reduces the sum to \$104,908.38 (p. 118).

The evidence substantially upon which this claim is founded consists of the several affidavits printed on pages 115 *et seq.* of the record. We have heretofore pointed out the patent weakness of these affidavits and the reasons why they are wholly unreliable. Furthermore, the court below held they did not constitute evidence regardless of the stipulation of counsel (Rec., 43).

In connection with the affidavit of Push-E To Neke Qua (Rec., 119), it will be observed the affiant states he has in

his possession a certain original roll of all Indians constituting the band in Iowa between the years 1855 and 1866, inclusive, showing births, deaths, etc. This book or roll was not offered in evidence and its absence is significant. In this connection we call attention to the following from paragraph 1 of the answer of the defendant Indians to the amended petition:

"And these defendants pray and demand legal, competent and strict proof as to the name, both now and in the past, the age, family history and antecedents of each and every member of petitioners' band of Indians." (Rec., p. 19.)

That many of the Indians who deserted to Iowa frequently returned to Kansas and drew their full share of annuities there is shown in the annual report of the Commissioner of Indian Affairs for the year 1866 (pages 269-71), and quoted by counsel (appellant's brief, p. 27). In this report it is stated:

"Whenever, as has frequently been the case, any of these stragglers have returned to the reservation at the time of the enrollment, which is made preliminary to an annuity payment, they have invariably been enrolled without the slightest objection, so far as I know, on the part of the tribe, and have received their full share of the annuities, and there is not today, nor has there ever been, any obstacle or objection in any quarter to their return to the tribe."

Appellee Indians have a complete defense to this claim in article 8 of the treaty of 1867 as follows:

"No part of the invested funds of the tribe, or of any moneys which may be due to them under the provisions of previous treaties, nor of any moneys provided to be paid to them by this treaty, shall be used in payment of any claims against the tribe accruing previous to the ratification of this treaty unless herein expressly provided for." (15 Stats., 497, Kappler, vol. 2, p. 952.)

If there is any possible liability under the first claim it is, by this article, solely with the United States. Valuable consideration passed by this treaty from appellee Indians to the United States, and the eighth article is as valid and binding today as it was when the treaty was ratified.

But in further reference to this claim we invite the court's attention to the following:

We have heretofore shown in that part of this brief pertaining to the jurisdictional act that the United States has dealt solely with the Sac and Fox Tribe or Nation and has never made a treaty or contract with the Iowa band. Prior to 1867 the claimants had no legal standing or relations with the United States. In that year, as we have seen, Congress enacted that the band of Sacs and Foxes in Iowa be accorded certain privileges. Before this act was passed they were simply individual Indians living apart from their tribe without permission or recognition from the Government. Under such circumstances Indians cannot create obligations of a contractual nature growing out of tribal rights. In the opinion of the Court of Claims in *Blackfeather et al. vs. The United States*, 37 C. Cl., 233, 241, Mr. Justice Weldon in speaking for the court said:

"The United States, as the guardian of the Indians, deal with the nation, tribe, or band, and have never, so far as is known to the court, entered into contracts, either express or implied, compacts, or treaties with individual Indians so as to embrace within the purview of such contract or undertaking the personal rights of individual Indians."

The case was affirmed on appeal (190 U. S., 368).

The case of the Eastern Band of Cherokee Indians *vs. United States* and the Cherokee Nation, 117 U. S., 288, is directly in point. The claimants constituted those Indians who refused to remove to the new reservation provided by

the treaty of 1835. Of them Mr. Justice Field in the opinion of the court said:

"The number that remained was between eleven and twelve hundred. They were without organization or a collective name."

This was exactly the situation of claimants prior to 1867. Of the grounds of alleged cause of action Mr. Justice Field said:

"The general ground upon which the petitioners proceed and seek a recovery is, that the Cherokee Indians, both those residing east and those residing west of the Mississippi, formerly constituted one people and composed the Cherokee Nation; that by various treaty stipulations with the United States they became divided into two branches, known as the Eastern Cherokees and the Western Cherokees; and that the petitioners constitute a portion of the former, and as such are entitled to a proportionate share of the funds which the United States hold in trust for the nation."

The opinion concludes as follows:

"They cannot live out of its territory, evade the obligations and burdens of citizenship, and at the same time enjoy the benefits of the funds and common property of the nation. Those funds and that property were dedicated by the Constitution of the Cherokees, and were intended by the treaties with the United States, for the benefit of the United Nation, and not in any respect for those who had separated from it and become aliens to their nation."

This court affirmed the judgment of the Court of Claims (20 Ct. Cl., 449) in the above case. The opinion of that court is so entirely in point that we quote somewhat freely therefrom.

In speaking of the Eastern band of Cherokees—the claimants—the court say on page 480:

“It is not the successor of any organization known to the laws or treaties of the United States, and as a band it has none of the individual rights or claims of those to whom money was promised under the treaty of 1835-1836, nor to any grants of Congress, except such as have been gratuitously given to it. The individual claimants under the treaty of 1835-1836 have probably all died, and if any of their claims were not settled before their deaths, such claims do not pass to the Eastern band, but belong to their legal representatives. Whether that be so or not is immaterial, as the claimant band is now seeking to recover not individual property, but a divided share of the common property of the nation.

“No treaty was ever made with this band nor with the people composing its membership. All the connection the band has with the United States is such as has been created by the laws of Congress, which may be altered by the same power that enacted them; and Congress can make no laws in relation to the band which are in conflict with the laws and constitution of the State of North Carolina, to which these Indians are subject.”

Of the Cherokee Nation and its relations with the United States the opinion states on page 480:

“Its relations to the United States are fixed by contracts, set out in treaties and laws, to which, as a nation, it has given its assent. The United States, by the terms of those contracts, have become trustee of its funds, which they have agreed to administer according to the provisions of those contracts.”

This court concludes its opinion as follows:

“They cannot have a divided share of the common property of the nation, and thus gain rights and privileges not accorded to any other Cherokee In-

dians—the living out of national territory, avoiding subjecting themselves to the laws of the nation, dividing its common fund and common property, and managing their affairs wholly independent of national authority. Such an admission of right might break the nation into innumerable bands and scatter into fractions funds which, by treaties with the United States and by the constitutions and laws of the Indians themselves, have been dedicated as common funds to the common and not divided benefit of the nation.

“In our opinion the Eastern band of Cherokee Indians, claimants in this case, have no rights in law or in equity in and to the moneys, stocks, and bonds held by the United States in trust for the Cherokees, arising out of the sales of lands lying west of the Mississippi River, nor in and to a certain other fund, commonly called the permanent-annuity fund, mentioned in the act of March 3, 1883 (22 Stats. L., 585), referring the case to this court; and a decree will be entered to that effect.”

We call particular attention to the fact that the jurisdictional act out of which the above case grew provided that the court should determine “the rights of the said band,” etc. (22 Stats. L., 585). Such legislation did not and could not make claimants such a legal entity as would enable them to recover, although it did, of course, accord the band the right of instituting suit. In the case at bar the band in Iowa is not claimant but the individual Sac and Fox Indians in Iowa are made claimants. See also *Pam-to-pee v. United States*, 187 U. S., 371.

That it was not the custom or practice of the Interior Department to pay annuities to Indians absent from their reservations is abundantly shown by the following:

During the very period when the branch of the Sac and Fox tribe was in Iowa a similar renegade branch of the tribe of Winnebagoes sought by petition to obtain a ruling from the Department that they were entitled to their share of annuities while absent. The Acting Commissioner of

Indian Affairs in a letter to the Secretary of the Interior dated September 15, 1863, stated:

"On the subject of said petition I have to say that it is the opinion of this office that when any member of a tribe abandons his tribal relations, and ceases to live with the tribe, he is not entitled to claim any portion of the tribal fund." (Report Commissioner of Indian Affairs, 1863, p. 339.)

In Senate Document 167, at page 25, the Secretary of the Interior states (Rec., pp. 153 and 154). (*Italics ours*):

"That is was not the practice or custom, but was against the policy of the Department to pay annuities to Indians off their reservation, is well established by the following extract from a letter, dated September 17, 1863, of the Secretary of the Interior to Francis Beveridge, who had petitioned in behalf of certain Winnebago Indians, then living off their reservation, for their distributive shares of the tribal annuities (Interior Department files, record of letters sent, vol. 4, p. 376), viz.:

"* * * The policy of the Government is to establish the Winnebagoes in such manner as will enable them to obtain their living by agricultural pursuits, and to that end large expenses have been incurred in the preparation of their new homes, on the upper Missouri, for the experiment; and the information possessed by the Department encourages the belief that the effort will be attended with success. All the means possessed by the Winnebagoes are necessary to the successful prosecution of the enterprise, and the proposition to parcel out their funds cannot, therefore, be entertained.

"If the parties asking the distribution of these annuities in Minnesota have become so far civilized as to justify their remaining in that State, and taking upon themselves the duties of citizens, they cannot, if they remain in the State, expect to be treated by the Department as Indians. All has been done for them by the Government that they had a right to expect.

* * * *If they desire, still, to be considered Winnebagoes they must unite with their tribe at their new*

home and share their perils, as well as their fortune.'

"The request of the petitioners cannot be granted.

"Very respectfully your obedient servant,

"J. P. USHER,

"Secretary of the Interior."

In the opinion of the Assistant Attorney General for the Interior Department, dated December 23, 1895 (Rec., pp. 91 and 92), it is stated as follows in regard to the claim for a share in annuities from 1855 to 1867:

"I have been informed, upon inquiry at the Indian division, that during said years it was the policy and practice of the Government to pay no annuities to Indians who absented themselves from reservations without authority, during the time of their absence, unless there was some provision of statute, or treaty, or agreement with the tribe of Indians that would authorize or require payment to such absent Indians. In this case, I have been unable to find any requirement for the payment to the Sac and Fox Indians of Iowa from 1855 up to and including 1866. This policy of withholding treaty benefits from Indians who absented themselves from reservations without authority is clearly indorsed by the terms of the treaty between the United States and the Sac and Fox tribe of Indians, agreed to October 1, 1859. (See section 7 of said treaty, 15 Stat., 469.) I am therefore of the opinion that they are not entitled to any of the annuities that were paid to the Sac and Fox Indians during the said years."

At page 199 of the Report of Commissioner of Indian Affairs, 1873, is found the following in a report from the Superintendent of Indian Affairs at Lawrence, Kan., to the Commissioner of Indian Affairs:

"The Government long ago established a wise provision that fragments of Indian tribes should forfeit their shares of annuities while absent from their proper reservations."

On January 30, 1896, the Secretary of the Interior in speaking of this claim said:

"It was not the policy or the custom of the Government during these years to countenance or permit absenteeism from reservations, or to pay annuities to Indians except at their agencies on their reservations" (Senate Doc. 167, p. 12; Rec., pp. 138 and 139).

The act of March 2, 1867 (14 Stat. L., 507), which allowed the Iowa branch in the future to receive its proportionate share of annuities there is as follows:

"That the band of Sacs and Foxes of the Mississippi now in Tama county, Iowa, shall be paid pro rata, according to their numbers, of the annuities, as long as they are peaceful and have the assent of the Government of Iowa to reside in that State."

It will be observed that the act says "shall be paid * * * as long as they are peaceful," etc. It would be difficult to construe this into a direction to pay for the past. The interpretation placed upon this act and the treaty of the same year at the time by both parties is very indicative of the intention. The United States paid the proportionate share of the annuities to the Iowa Sacs and Foxes and there was nothing said or done as to the annuities for the years prior thereto. It is very significant that when the first agent with the Iowa band received this payment he spoke in his report to the Commissioner of Indian Affairs of the "grateful acknowledgment of this evidence of the guardian care of a good and beneficent government" (Report Commissioner of Indian Affairs 1867, p. 347).

Calling to mind the broad and unrestricted powers given to the President and Congress by the 6th article of the treaty of 1859, we invite attention to the act of May 17, 1882, as follows: (*Italics ours.*)

"That hereafter the Sacs and Foxes of Iowa shall have apportioned to them from appropriations for fulfilling the stipulations of said treaties no greater sum thereof *than that heretofore set apart for them*" (22 Stat. L., p. 78).

The use of the word "hereafter" in the above act determines its character as general and permanent legislation. The act constitutes not only an unequivocal legislative approval of the amount of annuity moneys paid claimants since 1867, and the manner of such payment, but it also of necessity affirms and stamps with the approval of Congress, the action of the Department in not paying those Indians, who were wilfully absent without authority, any share of the annuities during such time.

But aside from the various reasons and authorities given above, there ever remains the potent and unanswerable fact that if Indians had been permitted to stray off and carry with them their right to receive their annuities the great work which has been accomplished by the Government in the betterment of the American Indian would have been early frustrated and rendered impossible of accomplishment. The Secretary of the Interior expressed it mildly indeed when he said:

"That the aforesaid policy of the Government was wise cannot be doubted. Had all the dissatisfied and disgruntled bands of Indians been permitted to separate from their tribes at will and allowed to set up separate establishments, the Government would have been put to much additional trouble in caring for them, and enormous additional expenditures would have been involved" (Sen. Doc. 167, p. 25; Rec., p. 154).

If permitted to segregate, the whole groundwork of the Government's plan of dealing with the Indians would have been taken away. It was manifestly essential that they be

kept together under the care and control of the agents with each tribe.

It must be remembered that there is no proof in the record as to who the original claimants were who are alleged to have received less than they were entitled to. There is no proof showing that any of such claimants are now alive. There are no parties to this action representing the estates of any deceased claimants, and many must have died during this interval. There is no proof attempting to show any relationship between the present claimants and those Sac and Fox Indians who resided in Iowa since 1855 and who have since died. There is no proof as to the names of claimants, there being no official roll of these Indians filed in this case. We submit, therefore, that assuming the Sac and Fox Indians in Iowa since 1855 have received less than they were entitled to under the laws and treaties, still the claimants could not recover because a payment to them could not possibly discharge such obligations.

The Committee on Indian Affairs of the House of Representatives in its report on H. R. 10133 were, but perhaps inadvertently, led to the view for which we contend. The Committee did not, however, seem to appreciate the legal consequences thereof. On page 15 of H. R. Rep. 3022, 59th Congress, 1st session the committee says:

"The period covered by said claims, from 1855 to 1899, equal the span of a generation and a half, nearly. During that time many of the individuals who benefited by the unequal apportionment of the annuities have died, and many of those from whom their just shares were withheld have also died.

The present generation of the one branch has not had so much benefit, and of the other branch has not suffered so much, as to warrant the taking of such a large sum of the money of one branch to liquidate such claims of the other branch. The new generation should not suffer the loss of the entire amount requisite to equalize these payments, nor should the

new generation, on the other hand, receive the whole amount of the annuities from which their ancestors were deprived, as the money was all spent soon after its payment. But the division of this inequality, your committee believe, would be equitable and fair under the circumstances."

The Committee then reduces each claim one-half, except the claim for the chief, which is reduced from \$22,500 to \$1,000. (Rec., p. 162.) We are unable to state just why the claims should be reduced 50 per cent. because the "span of a generation and a half, nearly," intervened. Perhaps the claims would have been reduced to the zero mark had there been an interval of three generations, nearly. The reasoning of the committee and its results are fatally irreconcilable. The committee only accorded to the facts that many of the individual claimants were dead and that claimants were an aggregation of individual Indians without any kind of corporate or other legal existence, 50 per cent. of the consideration to which such facts were entitled. Had the committee read and understood the decisions in the cases of Cherokee Indians *vs.* United States and the Cherokee Nation (20 Ct. Cl., 449) and of this court in affirming the same (117 U. S., 288), both heretofore quoted from, it is safe to say the committee would have found claimants were entitled to nothing. The dangers to be expected when the legislative department attempts to pass upon judicial questions could not be better illustrated.

In regard to the first claim, we submit we have shown that with the second and third claims it is now *res judicata*; that the eighth article of the treaty of 1867 entirely relieves appellee Indians from any obligation (if there be any) under this claim; that the Iowa band from 1853 to 1867 was not a legal entity in any sense and that claimants bear no legal relation to the original individual Indians composing that band; that the findings of the Secretary of the Interior on these claims, when previously presented, were and are sound

both in law and morals. It has, we submit, been further shown that it was the policy of the Department, and necessarily so, not to pay annuities to Indians absent from their reservations; that under the treaties and laws of Congress the band of Sac and Fox Indians in Iowa were not entitled to receive one cent in annuities prior to 1867; that the acts of Congress passed pursuant to express authority contained in the sixth article of the treaty of 1859, viz: the acts of 1867, 1882 and 1884 constitute a complete and effective bar and that there is an entire failure of evidence to support this claim.

Second Claim.

This claim is for a share of annuity money in addition to that which has already been paid appellants from the year 1867 to 1899. It is set forth in paragraph XII of the amended petition (Rec., p. 18). The amount claimed under this head is \$225,355.95 (Rec., p. 14). Counsel in his brief has casually changed this claim from one for the period from "1867 to 1899 both inclusive" (Rec., 13) to one from "1867 to 1884" (Appellants' Brief, 118), the amount of the second claim being thus reduced to \$69,912.01.

We shall not here again dwell upon the fact that the claimants are not shown to be the successors in interest of those who are alleged to have been deprived of a proper portion of their annuities nor upon the further fact that they are not entitled to recover because they are not a ~~corporate~~ *Legal* entity, being neither a sovereignty nor a body corporate. Our contentions in this regard have been set forth in that part of this brief relating to the "First Claim."

Aside from the above we insist there can be no relief accorded claimants under this claim for annuities paid prior to 1884 because Congress has stamped with its approval all such annuity payments, and that all payments since 1867 have been made strictly in accordance with the requirements of the laws and treaties. Besides, the evidence adduced is

not of a character upon which a judgment could be predicated, even though the legal principles for which counsel contends were sound.

The provision in the act of May 17, 1882 (22 Stats., 78), which has heretofore been adverted to and quoted is as follows:

"That hereafter the Sacs and Foxes of Iowa shall have apportioned to them from appropriations for fulfilling the stipulations of said treaties no greater sum thereof than that heretofore set apart for them."

The provision in the act of July 4, 1884 (23 Stats., 85), to which reference has also been made, is:

"That hereafter the Sacs and Foxes of Iowa shall have apportioned to them, from appropriations for fulfilling the stipulations of said treaties, their per capita proportion of the amount appropriated in this act, subject to the provisions of treaties with said tribes; but this shall apply only to the Sacs and Foxes now in Iowa: *And provided further*, That this shall apply only to original Sacs and Foxes now in Iowa to be ascertained by the Secretary of the Interior."

We have heretofore pointed out that the Department of Justice held the act of 1882 to constitute a legislative approval of the manner in which annuities had been apportioned prior thereto. See opinion of Assistant Attorney-General Hall (Rec., 91 to 94).

The use of the word "hereafter" stamps these acts as permanent legislation. There have been no acts of Congress repealing them. The act conferring jurisdiction upon the court in this case does not expressly repeal any law and it would be going far indeed to derive therefrom any implied repeal. The settled rule is that repeals by implication are not favored and will not be held to exist if there is any other reasonable construction. (*North American Commercial Co. vs. United States*, 171 U. S., 130.)

It must be remembered that under the express authority conferred by article 6 of the treaty of 1859 the President and Congress have full and complete authority to establish a new basis of apportionment of these funds.

With the foregoing in mind we shall take up for but a brief space the acts of 1832 and 1884.

The provisions in the act of 1882 are perfectly plain. The act clearly states that in the future the band of Sacs and Foxes in Iowa are to receive no more than had been paid them in the past.

It cannot be denied that the interpretation placed upon this act by the Department of the Interior and Department of Justice, viz., that it was a legislative affirmation of the amounts paid them in the past, is fair and reasonable.

The act of 1882 stood alone from the date of its passage until the enactment of the act of 1884. During this period the Department knew that its past and present method of dividing the annuities on the basis of the census of 1867 met with the approval of Congress. In 1884 Congress saw fit to provide what should be done from that time on. It contemplated a new census and provided that one should be taken. It said as to the annuities, "That hereafter," etc. Stripped of needless words, the act simply said that hereafter in making the annuity payments that the band in Iowa should receive annuities subject to the treaties with said tribe, and that only the "original" Sac and Fox Indians in Iowa were to share in the funds. *The duty of determining who were the original Sac and Fox Indians was by the act conferred upon the Secretary of the Interior.*

The limiting words are "original Sacs and Foxes." These words must be given some force. They cannot be ignored. Congress meant that *some* who claimed to be Sacs and Foxes in Iowa should not be paid. The proviso, and the words preceding it, are meant as a limitation on the clause, otherwise they mean nothing.

The provision in these two acts as follows: "Subject to the provisions of treaties with said tribes," simply meant that the obligations of the treaties must be enforced before the division should be made; or in other words that the deductions for national government, school and physician should be made prior to the division on the basis of the proportion of the original Sacs and Foxes in the band "now" (then) in Iowa.

Appellants' theory of annual rests is without support in the Treaties, laws or regulations. . . By the act of 1882 flat payments on the basis ascertained in 1867 were ratified, and the act of 1884 provided in effect that a new basis should be ascertained, to be followed each year in the future in dividing annuities.

Counsel in attempting to overcome the effect of the acts of 1882 and 1884 adopts the theory of "annual rests." In other words, that the act of 1884 in reality contemplated that the Secretary of the Interior should have a census taken every year. Counsel states (Appellants' Brief, pp. 101 and 102):

" * * * is persuasively shown by the identical mistake under the act of 1884, when one 'rest' instead of 'annual rests' was made under that act and that 'rest' continued to the present time, although contrary, counsel contend, to the plain intendment of the law."

The record shows (p. 33) there were no such rests between 1867 and 1884, but that the sum of \$11,174.66 was paid the Iowa band each year during that period. These payments were made upon the basis of the number of Indians as ascertained by the Secretary in 1867. The action of the Secretary in thus making payments was ratified by the act of 1882 and the payment of any larger sum was prohibited.

We find no reference, express or implied, to annual rests in the act of 1882. We repeat the act:

"That hereafter the Sacs and Foxes of Iowa shall have apportioned to them from appropriations for fulfilling the stipulations of said treaties no greater sum thereof than that heretofore set apart for them."

The act of 1884 is likewise silent on the subject of "annual rests." These acts not only did not contemplate the "annual rests" so earnestly contended for, but on the contrary we submit it clearly appears from the act of 1884 that Congress intended a new basis of apportionment should be arrived at to take the place of the basis established in 1867 and that such new basis should be adhered to until subsequently changed by Congress. For convenience we repeat the act of 1884:

"That hereafter the Sacs and Foxes of Iowa shall have apportioned to them, from appropriations for fulfilling the stipulations of said treaties, their per capita proportion of the amount appropriated in this act, subject to the provisions of treaties with said tribes; but this shall apply only to the Sacs and Foxes now in Iowa: and provided further, That this shall apply only to original Sacs and Foxes now in Iowa, to be ascertained by the Secretary of the Interior (23 Stats. L., p. 373).

Bearing in mind the facts that ever since 1867 a flat sum, viz., \$11,174.66, had been annually paid to the Iowa band; that Congress knew this because it legislated on this very subject but two years before by the act of 1882; that by the act of 1884 the Indians in Iowa were in the future to receive their per capita "*proportion*," but it provided that it should "apply only to the Sacs and Foxes *now* in Iowa," and "provided further that this shall apply only to original Sacs and Foxes *now* in Iowa," to be ascertained by the Secretary, etc., is it not perfectly clear that the action of the Secretary of the Interior in ascertaining then the number of Indians in Iowa and establishing and fixing the "*proportion*" was strictly in accord with the act? Indeed, had the Secretary attempted

to have a census made each year of the Sacs and Foxes in Iowa and those in Oklahoma there would have been lacking Congressional authority for such action.

The fact that in the year following in the Indian appropriation act ~~of~~ Congress repeated the provisions of the act of 1884 (23 Stats., 373), and subsequently in all such acts, omitted the same, only adds to our contention and further negatives the idea of "annual rests."

Thirty years have passed since the Secretary of the Interior first construed the act in accordance with what we submit was obviously the intention of Congress, and each year since he has followed the same interpretation.

The various Secretaries of the Interior were not only bound by their oaths of office and high sense of duty to divide these moneys in accordance with the requirement of the treaties and the laws, but expressly so bound by the act of July 26, 1866 (14 Stats., 280), now section 2097 of the Revised Statutes, as follows:

"No funds belonging to any Indian tribe with which treaty relations exist shall be applied in any manner not authorized by such treaty, or by express provisions of law; nor shall money appropriated to execute a treaty be transferred or applied to any other purpose, unless expressly authorized by law."

Every presumption favors a strict compliance with these provisions by each of the various high officials concerned.

The authorities are most numerous in support of the doctrine that where Congress, in enacting laws *in pari materia*, does not indicate its disapproval of the departmental interpretation of former acts, that such departmental interpretation and practice are controlling.

Attorney General Harmon well stated the doctrine in an opinion entitled "Arrears of Pension—Statutory Construction" (21 Op. Att'y Gen., 408). On page 410 he says (*italics ours*):

"The construction of this provision, however, I think is governed by an element which seems not to have been brought to the attention of the Assistant Secretary, namely, that of long-established departmental practice. It appears that the Pension Bureau always construed these provisions as not applicable to retired officers; that in 1890, 300 of such officers were thus actually upon the roll drawing invalid pensions, as well as their retired pay, and that the practice continued until stopped in that year by an act of Congress, hereinafter mentioned.

"If there be any ambiguity in a statute, a uniform practice of this kind, continuing for a quarter of a century, ought to be conclusive. (*Robertson vs. Downing*, 127 U. S., 607 and 613, and cases cited; *United States vs. Healy*, 160 U. S., 136, 145.) Departmental practice under an act of Congress has an effect similar in this respect to congressional practice under an ambiguous statutory provision. (*The Laura*, 114 U. S., 411, 416, and cases cited; *McPherson vs. Blackie*, 146 U. S., 1, 27.) *The weight to be given to departmental practice is greatly increased when Congress, in re-enacting the law, fails to indicate in any way its disapproval of the settled construction, to which it is thus regarded as giving an implied approval.* (18 Opin., 532; 20 Opin., 721; 2 Comp. Dec., 100.) The opinions just cited are those of executive officers only, but the first of them has been referred to with apparent approval by the Supreme Court (*Earnshaw vs. Cadwallader*, 145 U. S., 247, 258)."

The evidence in support of this claim is not, in view of the burden upon appellants, of that character upon which a judgment could be predicated. It is not proven nor even alleged that the numbers of Indians stated upon the roll were "original" Sac and Fox Indians in Iowa. It has been shown that only original Sac and Fox Indians in Iowa are entitled, under the laws and treaties, to share in annuities there. We have seen that the Department of the Interior

has stated the number shown by the census of the Iowa band taken in 1884 was excessive.

If the obvious and essential requirement as to "original" Sac and Fox Indians were ignored, and further, if it were assumed the act of 1884 required the Secretary of the Interior to cause a census of these Indians to be taken each and every year then it might with some force be argued that the United States having paid, as the record shows, ever since 1884 on the basis of the census of that year while the rolls show an apparently different ratio in some or if not all of those years that the United States is estopped to deny that the payments have not been made upon the true *per capita* basis. Whether this be a sound contention or not, it is one with which the defendant Indians are not concerned. The defendant Indians are not estopped. The Government officials in making an improper distribution (which we do not concede they did) would not in such action be the agents of appellee Indians. If a trustee committed errors of judgment it would indeed be a novel doctrine to charge his ward with the responsibilities of such errors.

So far as appellee Indians are concerned, we submit we have clearly demonstrated there is not only a failure of proof but lack of ground for a recovery against them on this claim.

There is another incident in the history of the tribe, not dwelt upon by appellants' counsel, but which if his contentions be sound would materially affect the claims during the period between 1867 and 1886, both inclusive.

There was a chief named Mo-ko-ho-ko with the tribe in Kansas. He was an ignorant, recalcitrant Indian, as were his followers. They amounted in all to about ninety Indians. This band remained in Kansas and refused to remove to the Indian country under the treaty of 1867. They were deprived of their annuities from 1868 until 1886, both inclusive, when they were compelled by the Department to join the main tribe on the reservation. See Senate Rep. 690, 52d Congress, 1st Session. Also House Doc. 38, 57th Congress,

1st Session, p. 10, where it is shown for the year 1887 that Mo-ko-ho-ko's band was again enrolled. (Rec., pp. 104 and 105.)

In 1892 there was introduced in the Senate a bill for the relief of this band. In the report from the Committee on Indian Affairs (Senate Rep. 690, 52d Cong., 1st Sess.) it is stated as follows:

"This bill claims that this band is entitled to their share of annuities provided in the earlier treaties, notwithstanding the agreement in the treaty of 1868. But your committee is of the opinion that the treaty of 1868 must be regarded as obligatory upon the whole tribe. The United States dealt with them as with a quasi nation, in accordance with previous usage, and the treaty of 1868 ought to be as well regarded obligatory upon the entire Sac and Fox Nation as the previous treaties, made in a similar manner, are regarded as obligatory upon the United States in favor of that nation. It cannot, therefore, matter that Mo-kaw-ho-ko refused to sign for his band the treaty of 1868. They were, as part of the nation, bound by what the constituted authorities of the tribe engaged for the entire tribe; and having chosen to disregard the engagement of the tribe, and the general desire of the tribe, that all its members should live on the territory provided for them in the Indian country, must accept the consequences stipulated to attend that refusal."

In a letter from the Commissioner of Indian Affairs also included in the Committee's report it is stated:

"If Congress decides that the Department erred, under section 21 of the treaty of 1868, in dividing the above sum annually between the Sacs and Foxes of the Mississippi in the Indian Territory, and those in Iowa, to the exclusion of those in Kansas, and that their share should have been reserved, then those in the Indian Territory and Iowa have been overpaid annually in the sum of \$4,459.50, or from the fiscal year 1870 up to and including the fiscal year 1884, for fifteen years, the sum of \$66,892.50.

"In addition, there has been paid by the United States to the Sacs and Foxes, from May, 1873, to the end of the fiscal year 1887, the sum of \$44,700.58 as interest on their trust fund, being proceeds of their lands, of which amount there would be due to Mo-kaw-ho-ko's band ninety-three eight hundred and thirtieths, or \$5,008.60, less \$855.70 paid them in May, 1887. The total amount overpaid the Sacs and Foxes in the Indian Territory and in Iowa and due Mo-kaw-ho-ko's band, if they were entitled to have their share retained for any length of time and until they removed to the Indian Territory, would therefore be \$71,045.40."

Mo-ko-ho-ko's band was absent from the reservation without permission and it has been finally held by both the executive and legislative branches of the Government that they were not during this period of fifteen years entitled to share in tribal annuities. As stated by the Secretary their place was with the tribe in the Indian country with the defendant Indians.

The bad example furnished by the claimants led Mo-ko-ho-ko and his followers to believe that they too might have the privilege extended to the mof sharing in annuities while absent.

At page XXXIX, Report of the Commissioner of Indian Affairs for 1880, it is stated:

"These Indians belong to the Sac and Fox tribe of the Mississippi, but under the influence of their chief, Mo-ko-ho-ko, who died two years ago, have persistently refused to remove from Kansas to the reservation of the tribe in the Indian Territory. By the favor shown their brethren in Iowa, they have been induced to believe that, if they would persist in their refusal to unite with their tribe, they would eventually have lands assigned them where they now are, in Osage county, Kansas, and obtain their share of the Sac and Fox annuity fund, by having it set apart for them."

The evidence in support of the actions of Mo-ko-ho-ko and his band is of identically the same character as the evidence supporting these various claims, viz: Congressional Documents.

Third Claim.

As stated in the amended petition, paragraph XIII (Rec., p. 14), this claim is for alleged unequal distribution of annuities between the years 1900 and 1907, but counsel in his brief treats the third claim as from 1884 to 1907. The change other than being slightly confusing is immaterial. All of the statements made in this brief in opposition to the second claim are applicable to the third claim for either of the periods mentioned.

Fourth Claim.

From paragraph XIV of the amended petition (Rec., p. 15) it appears that the Sac and Fox Indians in Iowa ask that a judgment for \$18,500 be rendered in this case in favor of one Push-e-ten-neke-que, an alleged principal chief with the Iowa band. The claim is for salary as chief for a period of 37 years, during which time it is not alleged that Push-e-ten-neke-que was a chief. On the contrary, it appears he became chief in 1881 and that Mau-ma-wah-ne-kah and Ke-wau-tau-qua were chiefs before him.

It should perhaps be first pointed out that this person, one Push-e-ten-neke-que, is not a party to this cause. In order to overcome this difficulty we find the following in brief on behalf of appellants (p. 109):

"By the treaty of 1842 and by the act of Congress of 1852, there is manifest a purpose on the part of the United States to take from the power of the Indian chiefs. This, however, could not be done all at once. A middle way was found in article 4 of the treaty of 1842 by the provision whereby each

chief of the Sacs and each chief of the Foxes should receive annually the sum of five hundred dollars. This five hundred dollars, however, was in no sense more than previously a personal perquisite of the chief. Its obvious purpose was to enable the chief to support such authority, prestige and power as remained in him and is in reality a tribal payment. The claim of appellant, therefore, in the present case, is a tribal claim and within the purview of the jurisdictional act."

It seems superfluous to add that counsel does not refer to any pages in the record in support of the above-quoted extraordinary statements. There are no facts in the record of this case to support them, nor can they be sustained by any sorts or kinds of records elsewhere.

The claim as set forth in the amended petition is predicated upon the fourth article of the treaty of 1842 as follows:

"It is agreed that each of the principal chiefs of the Sacs and Foxes shall hereafter receive the sum of five hundred dollars annually, out of the annuities payable to the tribe, to be used and expended by them for such purposes as they may think proper, with the approbation of their agent" (7 Stats. L., 596; Kappler, vol. II, p. 546).

The above is clearly an agreement between the United States on the one part and the *tribe* on the other, providing that out of the annuities "*payable to the tribe*" five hundred dollars should be payable to each of the principal chiefs, but "with the approbation of their agent." Subsequently certain members of the tribe of their own volition separated themselves from the main body and were without an agent up to the year 1867. Had an agent in Kansas approved a payment to an alleged chief in the Iowa band, there would even then have been grave doubt of the legality under this provision to make such payment in view of the separation;

but where no such approbation was had, there is no question presented. The agent's approbation is a condition precedent to the payment and without it the payment could not be legally made.

We have already shown that the United States has only made treaties and contracts with the Sac and Fox Tribe or Nation. In 1867, therefore, when the treaty of that year was concluded, the Sac and Fox Tribe with which it was negotiated was the identical legal entity as the Sac and Fox Tribe with which the treaty of 1842 was made.

The fourth article of the treaty of 1842 was clearly superseded by the ninth article of the treaty of 1867. The latter article is as follows (*italics ours*):

"In order to promote the civilization of the *tribe*, one section of land, convenient to the residence of *the agent*, shall be selected by said agent, with the approval of the Commissioner of Indian Affairs, and set apart for a manual labor school; and there shall also be set apart, from the money to be paid to the tribe under this treaty, the sum of ten thousand dollars for the erection of the necessary school buildings and dwelling for teacher, and the annual amount of five thousand dollars shall be set apart from the income of their funds after the erection of such school buildings, for the support of the school; and after settlement of the tribe upon their new reservation, the sum of five thousand dollars of the income of their funds may be annually used, under the direction of the chiefs, in the support of their national government, out of which last-mentioned amount the sum of five hundred dollars shall be annually paid to each of the chiefs." (15 Stat. L., 495, Kappler, vol. II, p. 951).

It will be remembered that by article twenty-one of this treaty the Sac and Fox band in Iowa were permitted to receive their annuities there. Hence we submit it is perfectly plain that the chiefs connected with the "national government" of the tribe were those who by the express

terms of the treaty should receive five hundred dollars annually and none others. It is also perfectly plain that the band in Iowa had not been forgotten or overlooked. In fact the privilege granted to the Indians in Iowa by the twenty-first article of this same treaty was a great concession to them.

It will be noted the provision for the chiefs in the treaty of 1867 is different from that in the treaty of 1842. By the latter the principal chiefs were to receive five hundred dollars annually out of the annuities payable to the tribe with the approbation of their agent. By the treaty of 1867, although the money comes from the annuities, it is taken out of the sum of \$5,000 to be set apart annually for the support of their national government. The treaty says in this regard: (*Italics ours*) "*and after settlement of the tribe upon their new reservation, the sum of five thousand dollars of the income of their funds, may be annually used, under the direction of the chiefs, in the support of their national government out of which last-mentioned amount the sum of five hundred dollars shall be annually paid to each of the chiefs.*"

It has been pointed out above that the band in Iowa had not been overlooked in the treaty of 1867, as a special provision had been made for them in the twenty-first article. But the ninth article, providing for the support of the national government of the tribe, was equally binding upon them as part of the tribe. Had it been intended that this sum should be used for the support of two or more tribal governments it would have so stated. It says for *their* "national government."

Secretary of the Interior Lamar held exactly in accordance with the above. In his letter to the Commissioner of Indian Affairs dated June 1, 1886, he stated: (*Italics ours.*)

*"The treaty was made with the tribe and all of the several bands or classes composing the tribe are bound by its provisions. * * **

"The object of both parties to the treaty was to *promote the civilization of the tribe.* * * *

"At the date of the treaty none of those Indians were on the reservation provided for by that treaty. It was not stipulated that said sum should be set apart from the pro rata share of those who might move on the reservation, but that it should be *set apart from the money to be paid to the tribe* under the treaty. * * *

"The twenty-first article of said treaty does not militate against this view, but confirms it.

* * * * *

"To what extent, then, are the Sacs and Foxes living in the State of Iowa excepted from the obligation of the treaty? Simply this: Their right to remain in Iowa is recognized, without forfeiting their right to share in the common fund. * * * This is the sole exception in their favor; but they are equally bound by the treaty stipulation, providing that from the common fund shall be deducted the amounts specified for the support of the school and national government." (Sen. Doc. 167, p. 8; Rec., p. 418.)

Article seven of the treaty of 1867 is significant. The first paragraph is as follows: (*Italics ours.*)

"As soon as practicable after the selection of the new reservation herein provided for, there shall be erected thereon, at the cost of the United States, a dwelling-house *for the agent of the tribe*, a house and shop for a blacksmith, and dwelling house for a physician, the aggregate cost of which shall not exceed ten thousand dollars; *and also, at the expense of the tribe, five dwelling-houses for the chiefs, to cost in all not more than five thousand dollars.*"

If this Push-e-ten-neke-que is entitled to the salary for all these past years why should he not also lay claim to a house or the value thereof? Legally his rights to the one are on exactly the same footing as his rights to the other. The reason for not pressing a claim for a house is most

patent. The seventh article provides that these houses for the chiefs are to be on the "new reservation." It says for "the chiefs." Article nine says the salaries are for "the chiefs." This clearly shows the same chiefs were meant, viz., those on the new reservation and only those. Yet counsel contends an alleged chief in Iowa is included within the provisions for "the chiefs' " salaries. The above therefore is the obvious reason why claim for a house has not been made. When the ably represented claimants are apparently modest in their demands, it is due all concerned that an explanation thereof be forthcoming.

Is it possible that a disaffected portion of the tribe could leave the reservation without permission and choose a chief among themselves who would be entitled to the salary provided by the treaties? The suggestion seems absurd. If they could choose one chief they could choose two, or any number and have them paid salaries at least until the \$5,000 were absorbed. And if one faction might do this, so might another, and the whole tribe could be thus rent by the voluntary acts of the Indians and the United States would have to pursue them with the treasure box and pay out annuities and salaries. The mere statement of the proposition is its best answer.

The several acts of Congress heretofore referred to which constitute legislative approval of the manner of dividing these annuities are fully applicable to this claim.

On March 31, 1900, Congress enacted as follows:

"That the Secretary of the Interior is directed to pay to Push-e-ten-neke-que, head chief of the Sac and Fox of the Mississippi Indians located in the State of Iowa, five hundred dollars per annum during the remainder of his natural life, beginning with and including the fiscal year nineteen hundred, in accordance with the terms of article four of the treaty proclaimed March twenty-third, eighteen hundred and forty-three." (31 Stat. L., 245.)

In regard to the above act it should be noted—

First. That Push-e-ten-neke-que is to receive \$500 per annum "during the remainder of his natural life," not during such time as he might hold the chieftaincy, but for his life.

Second. That the only reference to the chieftaincy is a matter of description of the Indian who is to receive each year the amount there designated.

Third. That there is no provision for paying the chief as such \$500 per year and no provision that his successor should receive anything.

Fourth. That should Push-e-ten-nek-que be deposed or for other reason cease to be a so-called chief, he would under this act be still entitled to receive \$500 each year during his life.

Fifth. That the act of May 31, 1900, was a valid and lawful exercise by the Congress of the power expressly conferred upon it and the President by the sixth article of the treaty of 1859.

This act of May 31, 1900, stands in a similar position to the act of March 2, 1867. There the President and Congress allowed the band in Iowa to share in the annuities when there; here the President and Congress have allowed one Indian in Iowa, a so-called chief, to receive \$500 each year during the term of his natural life.

The only evidence offered in support of this claim is the affidavit of the same Push-e-ten-neke-que found on page 25 of H. Doc. 38, 57th Congress, 1st session. (Rec., pp. 120 and 121.)

Other than being a sworn statement in which an Indian expresses a very ardent desire to obtain for himself \$22,500 from the funds of appellee Indians we can find nothing. The affidavit contains no facts upon which a valid claim could be predicated and we pass this affidavit and the "Fourth Claim" without further comment.

Fifth Claim.

The fifteenth paragraph of the amended petition (Rec., p. 16) relates to the fifth claim which is for a share in a fund for land disposed of by the tribe pursuant to the treaty of 1859. The amount of this claim is stated at \$58,923.04 and there is also claimed "such further amount of said land fund as may be shown at the hearing of this cause to be due and payable to the claimant Indians; and interest, at the rate of five per centum per annum, on the amount of the principal of said land fund that shall be found to be due and payable to the claimant Indians is also claimed and sued for from the time the proportionate share of claimant Indians was withheld from them, the computation of interest to begin not later than January 1, 1866." (Rec., p. 17.)

Appellants only claim that there were in Iowa 144 Sac and Fox Indians in 1859 (Rec., pp. 115 *et seq.*); hence this is in reality a claim of a *portion* of those Sac and Fox Indians who eventually went to Iowa. Those who were with the tribe at the time of the treaty and who shared in its benefits can hardly now claim the right of again receiving such benefits. Three chiefs of the Fox clan signed the treaty of 1859 (15 Stats., 467, 471; Kappler, vol. 2, pp. 796, 799). There has been no attempt made to show who these Indians were who had returned to Iowa prior to 1859 and what, if any, relationship, either legal or otherwise, they bear to the claimants in this case.

The same objections, therefore, as previously made that claimants have failed to show *who* they are and that *they* have been damaged, are applicable here.

We invite attention to the following from the seventh article of the treaty of 1859:

"That those who do not rejoin and permanently reunite themselves with the tribe within one year from the date of the ratification of this treaty shall

not be entitled to the benefit of any of its stipulations."

So far as appellee Indians are concerned this treaty provision is a complete bar to a recovery against them.

This claim was made to the Secretary of the Interior under the act of March 2, 1895 (28 Stats., 876, 903), previously referred to. In reporting thereon to Congress the Secretary *inter alia* stated:

"Those who left the reservation prior to the date of the treaty and failed to return forfeited any rights they might have acquired under the provisions of article seven had they returned.

"As to those who left subsequent to the date of the treaty, there is nothing of record, nor is there any evidence to show that these were not of that class of 'individual members' whose debts, 'due and owing at the date of the signing and execution hereof,' it was agreed by the fifth article of the treaty 'shall be liquidated and paid out of the fund arising from the sale of their surplus lands.' By their continued absence, without the consent of the Government, these also forfeited any rights that may have been attached to them as members of the tribe.

"There is nothing found due under the provisions of the treaty of 1859." (Sen. Doc., 167, p. 12; Rec., p. 139).

An effort is made in counsel's brief to show that the provisions of article seven of the treaty were not complied with. The entire article is as follows:

"The Sacs and Foxes of the Mississippi, parties to this agreement, are anxious that all the members of their tribe shall participate in the advantages herein provided for respecting their improvement and civilization, and to that end to induce all that are now separated to rejoin and reunite with them. It is therefore agreed that, as soon as practicable, the Commissioner of Indian Affairs shall cause the necessary proceedings to be adopted to have them notified

of this agreement and its advantages, and to induce them to come in and unite with their brethren; and to enable them to do so, and to sustain themselves for a reasonable time thereafter, such assistance shall be provided for them at the expense of the tribe as may be actually necessary for that purpose: *Provided, however,* That those who do not rejoin and permanently reunite themselves with the tribe within one year from the date of the ratification of this treaty shall not be entitled to the benefit of any of its stipulations" (15 Stats. L., 457; Kappler, vol. II, p. 798).

The only evidence upon which counsel relies to support his assertions that the Commissioner of Indian Affairs did nothing and hence violated the above requirements of the treaty is the following reply from the Department of the Interior to an inquiry on the subject:

"The records of that period are so incomplete as to details that the office is unable to say what, if anything, was done in the matter. An examination, as thorough as could be made at this time, fails to disclose any action of the kind indicated, but this is not conclusive evidence that there was none, as experience has shown that the old records are not altogether reliable" (Rec., p. 55).

The presumption, of course, is that the terms of the treaty were fully complied with (United States *vs.* Pugh, 99 U. S. 265; United States *vs.* Crusell, 14 Wall., 1).

If claimants rely on the assertion that the Commissioner of Indian Affairs did not take the action required of him by the treaty then claimants have the burden of proving its truth. The legal presumptions all favor a compliance with the treaty. "Every government officer is presumed to know his duty and to honestly perform it" (Griffith *vs.* United States, 22 Ct. Cl., 165).

The claim for interest is clearly untenable (United States

vs. Old Settlers, 148 U. S., 427; *Harvey vs. United States*, 105 U. S., 671).

Aside from the intrinsic weakness of this claim, as a legal proposition, there is here as in the other claims a complete failure of evidence.

If any Sum Should be Found Due Claimants the United States is Liable Therefor and not the Defendant Indians.

The fact that the United States is a sovereign nation does not alter or change its rights and liabilities as a guardian or trustee if it so assumes to act (secs. 40 and 41, "Perry on Trusts"). If breach of trust be charged against the United States in its actions as trustee it cannot in defense invoke any other or different rule than that applicable to all other trustees under similar circumstances (*ibid*). It is no defense to assert on behalf of the United States that it is a mere "stakeholder." A stakeholder has simply a naked title with no interest in the fund; it involves no discretion, but simply an obligation to pay to one party or the other, or both, upon the happening of a certain contingency (*Oriental Bank vs. Tremont Ins. Co.*, 45 Mass., 1, 10; *Fisher vs. Hildreth*, 117 Mass., 558, 562). The United States in the matter of the disbursement and distribution of annuity funds occupied an entirely different position with relation to the Indians. The duty included the exercise of a judgment and discretion of which the welfare and advancement of the Indian should have always been the controlling principle. Besides, the United States is not now holding funds, the title to which is in dispute, because the allegations in the amended petition relate to moneys disbursed many years ago.

It must be remembered that the United States Government is alone responsible for the administration of the laws and treaties upon which the members of the Iowa band

base their complaint. The tribe in Oklahoma has never possessed the right of control in the matter of the distribution of its funds. The United States on the contrary has had unrestricted authority in the division of annuity moneys. With such authority there must be an accompanying liability. If claimants make out any case at all it necessarily follows that the United States as the Guardian and Trustee of these Indians has been guilty of misappropriation of the funds belonging to the Sac and Fox tribe. If the United States has been thus at fault it would seem an extraordinary procedure for a court of justice to compel the present generation of loyal Indians in Oklahoma to make good the funds misapplied by the United States during the period covered by these claims, viz., over half a century. In other words one *cestui que trust* would be obliged to make good moneys misapplied by the guardian and trustee. Support for such a proposition cannot be found in the decisions of any court.

If a guardian uses trust funds in a manner not authorized by law he must bear all losses and he is chargeable with all increase from illegal ventures. The trust must be managed exclusively for the ward's benefit. In the management of the estate the trustee is bound to exercise such diligence and prudence as men of ordinary intelligence employ in their own affairs (21 Cyc., p. 78; 28 Amer. and Eng. Ency. Law, 2d ed., p. 1067. See also Lewin on Trusts, star pages 907 *et seq.*).

The Secretary of the Interior took exactly the position for which we now contend in 1892, the question having arisen in connection with a claim presented to Congress on behalf of Mo-ko-ho-ko (Mo-kaw-ho-ko) and his followers, mentioned in this brief under the second claim. In the report of the Senate Committee on Indian Affairs on this bill there is a letter from the Secretary of the Interior to the Chairman of the Committee, the late Senator Vilas, in which it is stated:

"As this band refused to remove to the Indian Territory and receive their share of the moneys, which could only be paid to those who personally resided there, it is my opinion that the bill should not pass, but if it is determined that Mo-kaw-ho-ko's band must be paid \$71,045.40 for refusing to comply with the treaty of 1868, that the United States, and not the Sac and Fox Indians, pay the amounts" (Senate Doc., 690, 52d Cong., 1st Sess., p. 3).

Recognition of similar liability on the part of the United States may be found also in the appropriation of \$100,000 by section 8 of the act of February 13, 1891 (26 Stats., 749, 759; Kappler, vol. 1, pp. 389, 398). This sum was appropriated to appellants in full settlement of all claims which said Indians might have upon the reservation in Oklahoma. It was appropriated from the Treasury of the United States and no demand was ever made upon appellee Indians by the United States on account of this payment.

If it be assumed that appellants have received less than they were entitled to it would mean that the United States had committed a breach of trust. The United States owed to all these Indians the same degree of care and caution in handling their funds as it exercises in regard to its own funds. In this connection we remind the court that the Government exercises a most extraordinary degree of care and caution in the disbursement of its own moneys. The Indians were entitled to have their funds protected in the same careful manner. If this were not done the United States alone is liable for any misappropriation shown to have been made.

Respectfully submitted,

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R. W. JOYCE,

Of Counsel.

In the Supreme Court of the United States.

OCTOBER TERM, 1910.

THE SAC AND FOX INDIANS OF THE Mississippi in Iowa, appellants,	} No. 614.
<i>v.</i>	
THE SAC AND FOX INDIANS OF THE Mississippi in Oklahoma and the United States.	

APPEAL FROM THE COURT OF CLAIMS.

SUPPLEMENTAL BRIEF FOR THE UNITED STATES.

In addition to what we have said concerning the fifth item of the claim, on pages 56 to 59 of our brief, we call attention of the court to the fact that of the sum of \$90,997.47, claimed as the share of the Iowa Indians in the proceeds of the sale of the surplus lands under the treaty of 1859, used in the payment of the debts of the Indians, \$62,529.51 of said sum is made up of the interest from January 1, 1867, to January 1, 1911, at the rate of 5 per cent.

Under section 1091 of the Revised Statutes—

No interest shall be allowed on any claim up to the time of the rendition of judgment thereon by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest.

The treaty of 1859 does not provide for the payment of interest, nor does any other treaty made with or act concerning the Sac and Fox Indians provide for interest.

The question of the allowance of interest against the Government has frequently arisen in suits in the Court of Claims, and it has always been held that the Government is not liable unless interest has been specifically provided for by law or by express contract. (*Tilson v. United States*, 100 U. S., 43; *Harvey v. United States*, 113 U. S., 243; *U. S. ex rel. Angarica v. Bayard*, 127 U. S., 251.)

CONSTRUCTION OF THE JURISDICTIONAL ACT.

In addition to what we have said on pages 21 to 26 of our main brief in this case, had Congress in any event intended that judgment might be rendered against the United States, it knew how to frame its legislation in order that there could be no mistake as to its intention; as witness the jurisdictional act in the case of *Blackfeather v. United States* (28 C. Cls., 451, 452), giving the Court of Claims jurisdiction:

That the said Shawnee Indians are hereby authorized and empowered to bring and begin a suit in law or equity against the United States Government in the Court of Claims to recover and collect from the United States Government any amount of money that, in law or equity, is due from the United States to said tribes, in reimbursement of their tribal fund for money wrongfully diverted therefrom.

APPORTIONMENT OF ANNUITIES.

As to the ratification of the apportionment of the annuities of the Sac and Fox tribe by the Secretary of the Interior in the acts of 1867, 1882, and 1884, we call the attention of the court to section 8 of the act of February 13, 1891 (26 Stat., 759), ratifying the treaty of the same date between the United States and the Sac and Fox tribe of Oklahoma, by which the Iowa band was paid the sum of \$100,000 for their interest in the reservation of the tribe in Oklahoma, as against \$485,000 paid to the tribe, a proportion considerably less than was allowed them by the Secretary of the Interior.

Case of *Pam-to-pee v. United States*, 187 U. S., 371 (cited in the defendants' brief, pp. 39, 40, and 41).

The attorneys for the appellants insist that the case of *Pam-to-pee v. United States* is not applicable to the case at bar because the Secretary of the Interior in that case was distributing a judgment of the Court of Claims. This in our opinion is the strongest point in favor of its application to this case.

The judgment of \$104,626 was rendered by the Court of Claims in the case of the *Pottawatomie Indians v. United States* (27 C. Cls., 403, 421), in which it was held that that court was given jurisdiction to "determine the aggregate right, leaving the distribution, as the administration of a trust, to the Interior Department."

The suit arose out of the following state of facts: By the treaty of September 27, 1833 (7 Stat., 442), the Pottawatomie Indians residing in Michigan ceded their lands in that State to the United States; and by article 3 agreed to remove from their reservations in Michigan within three years from the date of the treaty. By a supplementary article permission was given to a certain part of the tribe on account of their religious creed to remove to the northern part of Michigan, and it was "agreed that in case of such removal a just proportion of all annuities payable to them under former treaties and that arising from the sale of the reservation on which they now resided shall be paid to them at L'Arbre Croche." (Id., p. 445.)

The tribe, comprising most of the Indians, removed in accordance with article 3 of the treaty to the reservation west of the Mississippi River. Some of those remaining in Michigan and Indiana removed to the northern part of the peninsula of Michigan in accordance with the supplemental article, but most of them remained in southern Michigan, to which the Government did not object, and annuities were paid to the Pottawatomie Indians of Michigan and Indiana who did not remove to the reservation west of the Mississippi River in the sum of \$75,162.50.

There was a dispute as to whether they had received from the United States the amount of annuities to which they were entitled. To settle this conten-

tion Congress on March 19, 1890, passed a special act (26 Stat., 24) giving the Court of Claims jurisdiction of the claim in the following language:

That the Court of Claims is hereby authorized to take jurisdiction of and try all questions of difference arising out of treaty stipulations with the said Pottawatomie Indians of Michigan and Indiana, and to render judgment thereon; power is hereby granted the said court to review the entire question of difference de novo, and it shall not be estopped by the joint resolution of Congress approved twenty-eighth July, eighteen hundred and sixty-six, entitled "Joint resolution for the relief of certain Chippewa, Ottawa, and Pottawatomie Indians," nor by the receipt in full given by said Pottawatomies under the provisions of said resolution, nor shall said receipt be evidence of any fact except of payment of the amount of money mentioned in it.

The joint resolution of July 28, 1866, which the jurisdictional act eliminated, after referring to the treaty of the Pottawatomie Indians, provided for the payment of \$39,000 "in full of all claims in favor of said Michigan Indians, either against the United States or said nation of Indians, past, present, or future, arising out of any treaty made with them or any band or confederation thereof, and the annuity now paid to them is to be restored and paid to said nation for the future. Said sum of \$39,000 is to be paid out of the fund of said Indians by the United States, now held in trust for said nation," etc.

The Court of Claims said at page 414, speaking of the supplementary article of the treaty of 1833, allowing a part of the tribe to remain in Michigan, that "without it the claimant would have no standing in the court." The judgment of the Court of Claims was affirmed by this court on practically the same grounds that had been decided by the Court of Claims (148 U. S., 691).

Afterwards another suit was filed on behalf of a number of Pottawatomie Indians who remained in Michigan after the tribe removed, upon the ground that they had been omitted from the roll prepared by the Secretary of the Interior in the distribution of the judgment (36 C. Cls., 427).

The Court of Claims held that the applications for enrollment came too late; that the Secretary had made up the roll and the money had been distributed; that it was the duty of the claimants to have had their names placed thereon; and in the findings of fact found that there were 272 applicants who were entitled to have been placed upon the roll if they had applied in time.

When the case came on appeal (187 U. S. R., p. 371) the defense was raised that under the plenary power of Congress over tribal Indians the court had no jurisdiction to review the acts of the Secretary of the Interior in making up the roll and distributing the judgment. This court, however, held that the Court of Claims had a right to supervise the payment of its judgments and establish the identity of its beneficiaries. Mr. Justice White, with whom

concurred Mr. Justice McKenna, took the opposite view, that while the Court of Claims had jurisdiction to render judgment for the aggregate sum to which the Indians were entitled, the duty of making the roll and distributing the fund devolved exclusively upon the Secretary of the Interior, and under the plenary power of Congress the courts had no authority to review the action of the Secretary of the Interior.

It appears from the opinion of the court and from the dissenting opinion that the majority and the dissenting justices were in harmony upon the proposition that the action of the Secretary of the Interior in distributing an appropriation by Congress, instead of a judgment of the Court of Claims, is not subject to review.

New York Indians v. United States (170 U. S., 1).

The case of the *New York Indians v. United States*, relied upon by the attorneys for the appellants, has no application to the facts involved in the case at bar.

The New York Indians, comprising the Six Nations and several affiliated bands of New York Indians, purchased, with the consent of the United States, from the Menominee Indians of Wisconsin, certain tracts of land on or near Green Bay, Wis., 500,000 acres at one time and 5,000,000 acres at another. Afterwards, by treaty between the Menominee Indians and the United States, 500,000 acres of these lands were confirmed to the New York Indians. Afterwards some of these Indians moved from New York to Wisconsin and took up their residence.

On June 15, 1838, the treaty of Buffalo Creek was entered into between the United States and the New York Indians, by which the Indians ceded to the Government their lands in the State of Wisconsin in consideration of \$518,500, to be paid upon removal or to be used for expenses of removal and support after removal, and a reservation of 1,824,000 acres of land to be set apart for them west of the Mississippi River for a permanent home, and to which they agreed to remove "within five years, or such other time as the President might from time to time appoint." Upon their failure to do so they should forfeit to the United States all interest in the lands so set apart.

About 150 of the New York Indians removed to the reservation set apart for them west of the Mississippi River, and only 32 patents for allotments were issued on that reservation to New York Indians. The President never fixed any time for their removal, and the Government never took any steps to have their interest in the reservation west of the Mississippi forfeited.

The question was whether, in view of the language used in the treaty, and the fact that their lands in Wisconsin had been sold and taken possession of by the United States, the grant of the reservation west of the Mississippi River was a grant *in præsenti*, or in view of the fact that the New York Indians were to remove to the reservation and to receive the allotments there a grant *in futuro*. The court held that it was a grant *in præsenti*, and the New York Indians

held title as communal owners; that they had no right to any of the money consideration, as that was contingent upon their removal to the reservation in Kansas.

The New York Indians were scattered over the State of New York; some of them, Oneida Indians, had gone to Canada with the consent and approval of the Oneida tribe, carrying their personal property with them (the Oneida communal property had been divided before they left), and retaining their interest in the communal property of the New York Indians as a whole. The question of the right of those Indians who had removed to Canada to participate was not before this court on appeal, but was considered by the Court of Claims, which held that they had a right to participate in the proceeds of the sale of the lands in the reservation beyond the Mississippi River.

In the case at bar the claimant Indians were paid for their interest in the reservation in Kansas, upon its sale to the United States, over \$42,000 upon the award of the Secretary of the Interior in 1895. They were afterwards, on February 13, 1891 (26 Stat., 749; Rec., pp. 749, 759), paid for their interest in the reservation in Oklahoma upon its cession to the United States for the purpose of allotment, receiving the sum of \$100,000.

The question of the forfeiture of annuities through laches in not having their names enrolled never arose in the case of the New York Indians. They never moved to the reservation as the Sac and Fox Indians did, therefore they never had any opportunity to

desert the tribe. As a matter of fact, they were living scattered over the State of New York, and some of them had moved to Wisconsin and some to Canada. All were therefore on the same footing as the reservation west of the Mississippi River.

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In the Supreme Court of the United States.

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THE SAC AND FOX INDIANS OF THE Mississippi in Iowa, Appellants, <i>v.</i> THE SAC AND FOX INDIANS OF THE Mississippi in Oklahoma and the United States.	}	No. 614.
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APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This suit was instituted by the Sac and Fox Indians of Iowa, under a special act of Congress, against the Sac and Fox Indians of Oklahoma for the recovery of certain annuities and moneys derived from the sale of lands, amounting to \$454,215.80, which, as they allege, properly belonged to them, but were illegally diverted by the United States and paid to the defendant Indians.

The jurisdictional act is set forth in the findings of the court below. (Rec., p. 34.)

There is a tradition current in the tribe that the Sac Indians, sometimes spelled Sock and sometimes Sauk, came originally from New England, and were driven westward by the English during the period of King Phillip's war.

The Sac Indians appear to have formed a union at some unknown date with the Foxes from the Great Lakes, for, on November 3, 1804, a treaty was made "between the United States of America and the united tribes of Sac and Fox Indians" (7 Stat., 84-87), by which the Indians ceded all of their territory along the Mississippi River in what is now the States of Illinois and Iowa to the United States and fixed the boundary of the two tribes farther west in what is now the State of Iowa, the consideration being goods to the value of \$2,200 and a perpetual annuity in "goods suited to the circumstances of the Indians of the value of one thousand dollars (six hundred of which are intended for the Sacs and four hundred for the Foxes)."

The defendant Indians acquired their distinctive title of the "Sac and Fox Indians of the Mississippi" from the treaty of September 13, 1815 (7 Stat., 134, 135), entered into with a portion of the Sac and Fox tribes which refused to go to war with the United States, and moved to the Missouri River, and were afterwards known as the "Sac and Fox Indians of the Missouri" to distinguish them from the defendant Indians, who have since been known as the "Sac and Fox Indians of the Mississippi."

On October 21, 1837, the United States entered into a treaty with the defendant Indians (7 Stat., 540-542), by article 1 of which the said Indians ceded to the United States a part of the lands in Iowa, containing 1,250,000 acres, lying west and adjoining the tract conveyed by the treaty of September 21, 1832.

Article 2 provided among other things that the sum of \$10,000 should be paid them annually, in the manner annuities are paid, at such time and place and in money or goods as the tribe may direct, provided that it may be competent for the President to direct that a portion of the same may, with the consent of the Indians, be applied to education, or other purposes calculated to improve their condition.

On October 11, 1842, the United States entered into a treaty with the defendant Indians, the Sac and Fox tribe of the Mississippi (7 Stat., 596-600), by article 1 of which the Indians ceded all their lands in the State of Iowa to the United States, reserving the right to occupy, for the term of three years from the signing of the treaty, a portion of the ceded lands therein described.

In consideration of the cession of the lands in Iowa, it was provided in article 2 of said treaty that the United States should pay to the Sac and Fox Indians annually the sum of \$40,000, and in addition thereto should pay their debts, amounting to the sum of \$258,566.34. This article also provided that the President should, as soon after the ratification of the treaty as was convenient, assign a tract of land on the Missouri or its tributaries suitable and

convenient for Indian purposes to the Sac and Fox Indians for a permanent and perpetual residence for them and their descendants.

Article 4 of the treaty provided that each of the principal chiefs of the Sacs and Foxes should thereafter receive the sum of \$500 annually out of the annuities payable to the tribe, to be used and expended by them for such purposes as they may think proper, with the approbation of their agent.

Article 5 provided for the retention of \$30,000 from each annual payment in the hands of the agent of the tribe, to be expended for national and charitable purposes among their people.

In pursuance of article 2 of the treaty of October 11, 1842, by order of the President, a reservation was assigned in the territory which afterwards became a part of the State of Kansas, to the defendant Indians for a permanent residence, and they were practically all removed to that reservation by the fall of 1846, where they all resided together, receiving their annuities each year *per capita* until the year 1855.

In the year 1855 certain members of the Sac and Fox Indians left their reservation in Kansas without permission of the agent or other United States official and proceeded to their old reservation in the State of Iowa, and after wandering around the State for some time settled in Tama County.

From 1862 to 1866 other members of the tribe left their reservation in Kansas without permission of the United States authorities and joined those already in

Iowa. The number of Indians, their names, ages, and sex, who left their reservation in Kansas between 1854 and 1866 have not been established by competent evidence. (Rec., p. 35.)

On July 15, 1856, an act was passed by the legislature of Iowa granting the consent of the State permitting the Sac and Fox Indians then residing in Tama County to remain in the State, and requesting the governor to inform the Secretary of War of its action and to urge upon the department the propriety of paying said Indians their proportion of the annuities due or to become due to the tribe of Sac and Fox Indians.

By section 2 of the act the sheriff of Tama County was directed to take the census of the Indians then residing there, giving the name and sex of each, a list of whom should be recorded in the county court; and those persons and none others were to have the privileges granted by the act.

After the passage of this act the claimant Indians purchased with their own funds lands in Tama County, which they have resided on and cultivated ever since. The number, names, ages, and sex of Indians embraced within the act of the Iowa legislature have not been shown by competent evidence. (Rec., p. 36.)

From 1855 to 1866 there was no agent or other government official with the Iowa band of Indians, and they do not appear to have been recognized by the United States during that period. The fact that some of the Sac and Fox Indians had left their res-

ervation in Kansas appears to have been known to the Government at the time of the treaty of 1859, to which we shall later refer. The special agent, Leander Clark, took a census of the Indians in Iowa in 1866, which showed their total number at that time to be 264 persons; and he appears to have expended for them the sum of \$5,359.06 for goods and traveling expenses, and on account of annuities for the year 1865. With this exception all of the annuities and other moneys belonging to the Sac and Fox Indians from 1855 to 1866 were paid to or expended for the Indians by the agents and superintendents at the Sac and Fox Agency, Kans. (Rec., pp. 36, 37.)

The Sac and Fox Indians who left Kansas in 1862 and afterwards went to Iowa received their shares of the annuities at the last payments before they left. Whether or not any of them ever returned to Kansas and received their annuities at the agency has not been shown by competent evidence. (Rec., pp. 36, 37.)

On October 1, 1859, the United States entered into a treaty with the confederated tribes of Sacs and Foxes of the Mississippi at the Sac and Fox Agency, in the Territory of Kansas (15 Stat., 467-471), by which it was provided that a reservation of 153,600 acres of land should be set apart for allotment in severalty (arts. 1, 2, 3, and 4), and the surplus lands of the reservation should be sold to pay the debts of the confederated tribes of Sacs and Foxes, or the individual members thereof (art. 5).

Article 6 of the treaty provided that if the proceeds of the sale of their surplus lands should be insufficient to carry out the purposes and stipulations of the agreement, such additional means as might be necessary therefor should be taken from the moneys due them under the provisions of former treaties. The treaty also provided that in order to render unnecessary any further agreements with the United States, "It is hereby agreed and stipulated that the President, with the assent of Congress, shall have full power to modify or change any of the provisions of former treaties with the Sacs and Foxes of the Mississippi in such manner and to whatever extent he may judge to be necessary and expedient for their welfare and best interest."

Article 7 recited the fact that the Sacs and Foxes of the Mississippi were anxious that all members of the tribe should participate in the advantages of the treaty, and to that end invited all who were separated to rejoin and reunite with them, and it was agreed that the Commissioner of Indian Affairs, as soon as practicable, should have the nonresident members of the tribe notified of the advantages of the treaty in order to induce them to come in and unite with their brethren;

and to enable them to do so and to sustain themselves for a reasonable time thereafter such assistance shall be provided for them at the expense of the tribe as may be actually necessary for that purpose: *Provided, however,* That those who do not rejoin and perma-

nently reunite themselves with the tribe within one year from the date of the ratification of this treaty shall not be entitled to the benefit of any of its stipulations.

By a clause in the Indian appropriation act of March 2, 1867 (14 Stat., 507), Congress for the first time recognized the right of the Iowa Indians to participate in the annuities of the Sac and Fox tribe by the following language:

For interest on eight hundred thousand dollars, at five per centum, per second article, treaty eleventh October, eighteen hundred and forty-two, forty thousand dollars: *Provided*, That the band of Sacs and Foxes of the Mississippi now in Tama County, Iowa, shall be paid pro rata, according to their numbers, of the annuities, so long as they are peaceful and have the assent of the government of Iowa to reside in that State.

On February 18, 1867, the United States entered into a treaty with the tribe of Sac and Fox Indians of the Mississippi, which was proclaimed October 14, 1868 (15 Stat., 495-504), by which the Indians ceded to the United States all of their lands in the Territory of Kansas, and agreed to their removal to a reservation south of the lands of the Cherokees in the Indian Territory, now the State of Oklahoma. The total lands ceded aggregated 147,393.32 acres, for which the United States agreed to pay at the rate of \$1 per acre, and made appropriation for payment of the same by the act of April 10, 1869 (16 Stat., 35).

By the ninth article of the treaty of 1867, as amended by the Senate, it was provided that the sum of \$10,000 should be paid for the erection of necessary school buildings and dwelling for the teacher, and \$5,000 should be set apart from the income of their funds, after the erection of such school buildings, for the support of the school. After the settlement of the tribe upon their new reservation, the sum of \$5,000 of the income of their funds might be annually used, under the direction of the chiefs, in support of their national government, "out of which last-mentioned amount the sum of \$500 shall be annually paid to each of the chiefs" (pp. 500 and 501).

By the tenth article of the treaty of 1867, the United States agreed "to pay annually, for five years after the removal of the tribe, the sum of \$1,500 for the support of a physician and purchase of medicines, and also the sum of \$350 annually for the same time, in order that the tribe may provide itself with tobacco and salt."

By article 21, which was inserted by the Senate as an additional article, the Sacs and Foxes of the Mississippi, parties to the agreement, expressed their desire that all of the tribe should participate in the advantages to be derived from the investment of their national funds and sales of their lands, and agreed that as soon as practicable the Commissioner of Indian Affairs should cause the necessary proceedings to be adopted to have the absent members of the tribe notified of the treaty and its advantages, and

to induce them to come and permanently unite with their brethren; and—

That no part of the funds arising from or due the nation under this or previous treaty stipulations shall be paid to any bands or parts of bands who do not permanently reside on the reservation set apart to them by the Government in the Indian Territory, as provided in this treaty, except those residing in the State of Iowa; and it is further agreed that all money accruing from this or former treaties now due or to become due said nation, shall be paid them on their reservation in Kansas; and after their removal, as provided in this treaty, payments shall be made at their agency on their lands as then located.

The first payment to the Sac and Fox Indians in Iowa under the treaty of 1867 was made in the early part of that year in the sum of \$11,174.66, and payments at that rate were made up to and including the fiscal year 1884. The numbers upon which the annuities were apportioned by the Secretary of the Interior during this period are not shown, and there does not appear to have been any fixed numbers adopted and used as a basis for such apportionment. The claimant Indians protested that the amount apportioned was not their pro rate share according to numbers and refused to accept payment until Congress, by a clause in the Indian appropriation act of May 17, 1882 (22 Stat., 78), provided:

That the sum of one thousand five hundred dollars of this amount shall be used for the pay

of a physician and for purchase of medicine; in all, fifty-one thousand dollars: *And provided further*, That hereafter the Sacs and Foxes of Iowa shall have apportioned to them from appropriations for fulfilling the stipulations of said treaties no greater sum thereof than that heretofore set apart for them.

They then consented to receive their share apportioned to them by the Secretary of the Interior. (Rec., p. 38.)

By the act of July 4, 1884 (23 Stat., 85), Congress provided:

That hereafter the Sacs and Foxes of Iowa shall have apportioned to them, from appropriations for fulfilling the stipulations of said treaties, their per capita proportion of the amount appropriated in this act, subject to provisions of treaties with said tribes; but this shall apply only to the Sacs and Foxes now in Iowa: *And provided further*, That this shall apply only to original Sacs and Foxes now in Iowa, to be ascertained by the Secretary of the Interior.

In pursuance of the requirements of this act the census of the Sac and Fox Indians in Iowa was taken under the direction and supervision of the Secretary of the Interior, and it was ascertained that there were at that time residing in Iowa 317 original Sac and Fox Indians. He also caused a census of the Sac and Fox Indians on the reservation in Oklahoma to be taken, and found that there were 505 Indians in 1884 and 513 in 1887 on said reservation. Since

that time the numbers 317 for the claimant and 513 for the defendant Indians have been used and adopted as a basis of apportionment of annuities of said tribes between the two branches, except for the years 1885 and 1886, when the number employed as a basis was 505. (Rec., pp. 38, 39.)

In apportioning the sum of \$51,000 appropriated by Congress annually for the Sac and Fox Indians of the Mississippi, \$1,000 under the treaty of 1804, *supra*; \$10,000 under the treaty of 1837, *supra*; and \$40,000 under the treaty of 1842, *supra*, the Government has from 1885 to the date of the filing of the petition herein first deducted from said \$51,000 the sum of \$11,500 provided for by the ninth and tenth articles of the treaty of 1867 and expended the same for the exclusive benefit of the Oklahoma branch. The remainder has been apportioned between the two branches of the tribe on the basis of 317 for the appellant and 513 for the defendant Indians. These numbers have been used as a basis of apportionment from 1884 to 1907, excepting for the years 1885 and 1886, when 505 was used as the basis for the defendant Indians.

The competent evidence presented to the court does not show what increase, if any, or what decrease, if any, there has been in the numbers of the two branches of the tribe during that period. (Rec., p. 39.)

The \$1,500 referred to by the Court of Claims in its twelfth finding (Rec., p. 39) is embraced in the \$11,500 referred to in the eleventh finding.

By the act of May 31, 1900 (31 Stat., 245), the Secretary of the Interior was directed—

to pay to Push-e-ten-neke-que, head chief of the Sac and Fox of the Mississippi Indians located in the State of Iowa, five hundred dollars per annum during the remainder of his natural life, beginning with and including the fiscal year nineteen hundred, in accordance with the terms of article four of the treaty proclaimed March twenty-third, eighteen hundred and forty-three.

The Iowa Indians presented to the Fifty-third Congress three claims:

1. For their proportionate share of the tribal annuities from 1853 to 1866, both inclusive, amounting to..... \$143, 745. 80
2. For their just proportionate shares of the tribal annuities for the period from 1867 to 1894, inclusive, including their proportionate share of \$5,000 for manual labor school and \$5,000 for support of national government of the tribe, and of the amount used for physicians and medicines, aggregating..... 157, 183. 45
3. Their proportion of the appropriation of \$147,393.32 for lands ceded by the treaty of 1867, amounting to \$50,-302.84, with interest at 5 per cent from 1873, amounting to..... 57, 848. 27

By the act of March 2, 1895 (28 Stat., 876-903), these claims were referred by Congress to the Secretary of the Interior for investigation and report, and he was directed to—

ascertain whether, under any treaties or acts of Congress, any amount is justly due them as a portion of said tribe from those of said tribe now in Oklahoma by reason of any unequal distribution of tribal annuities, land funds, or funds from other sources, and if so, how much, giving full opportunity to all

parties in interest to be heard, and to report his conclusions to Congress at the next assembling thereof.

In pursuance of the requirements of this act the Secretary of the Interior thoroughly investigated the claims in question, and found:

As to the first claim that nothing was due, as the same had been forfeited in consequence of the abandonment of the reservation by the Indians in defiance of treaty obligations and without the consent of the Government.

As to the second claim he found that nothing was due from the annuities paid to the Oklahoma Indians from 1867 to 1894, as the same had been properly and justly apportioned and paid in accordance with the provisions of the treaties and acts of Congress.

As to the third claim, for their proportionate share of the appropriation for the lands ceded under the treaty of 1867, he found that there was due them the sum of \$29,184.38 on account of principal and \$32,832.45 interest thereon at the rate of 5 per cent per annum from July 1, 1873, to December 31, 1895, inclusive, aggregating \$62,016.83, from which was deducted \$19,123.58, already paid to said Indians on account of said claim, leaving a balance of \$42,893.25, which was reported to Congress by the Secretary of the Interior on March 12, 1896, as due to said Indians, and was afterwards transferred by Congress on the books of the Treasury Department from the funds of the defendant Indians to the credit of the claimants. (Rec., pp. 39, 40.)

Appellants claim in the court below:

1. A pro rata share, according to numbers, of the annuities from 1855 to 1866, inclusive.....	\$125,647.96
2. Balance due them of their pro rata share, according to numbers, of the annuities from 1867 to 1899, inclusive.....	225,355.95
3. Balance due them of their pro rata share, according to numbers, of the annuities from 1900 to 1907, inclusive.....	25,788.85
4. Annuities due the chiefs of the Foxes in Iowa from 1862 to 1899.....	18,500.00
5. Their pro rata share, according to numbers, of the proceeds received from the disposal of land under the treaty of 1859.....	58,923.04
Total.....	454,215.80

Items 4 and 5 were not presented to the Fifty-third Congress nor referred by Congress to the Secretary of the Interior for consideration under the act of March 2, 1895, *supra*.

On April 6, 7, and 8, 1909, the case was argued in the Court of Claims, and on May 20, 1909, the court filed findings of fact and conclusion of law, dismissing the petition.

On June 9, 1909, the claimants, appellants here, filed a motion for a new trial, which was argued and submitted on January 10, 1910. On March 21, 1910, the claimants' motion was allowed in part and overruled in part, but the judgment was allowed to stand.

Points raised in defense.

1. Congress by the jurisdictional act never intended to render the United States liable to the appellants on this claim or any part of it, but simply allowed the Government to be joined as a party defendant because it holds the tribal funds in trust.

2. There is no liability against anyone on the first item of the claim, because the individual Indians who deserted their reservation without permission of the Government forfeited their annuities. *Second*, because there is no competent evidence of the number or identity of said individuals, and, *third*, because Congress has ratified the payment of the annuities to the tribe.

3. There is no liability on items Nos. 2 and 3, because the annuities were properly paid to the tribe and the payments ratified by Congress.

4. There is no liability on item 4 because the act which for the first time gave an annuity to a Fox chief in Iowa was, according to its terms, prospective, and did not provide for the collection of back annuities.

5. There is no liability on the fifth item of the claim, first, because there is no competent testimony as to the identity and number of the members of the tribe who left their reservation in Kansas and went to Iowa. *Second*, because there is no evidence to show that all of such Indians did not return in accordance with the treaty of 1859, and have their debts paid. *Third*, because none of the money derived from the sale of land under the treaty of 1869 was paid into the Treasury to be held in trust for the tribe, all of the proceeds having been used in the payment of the debts of the Indians.

ARGUMENT.

The competent evidence is embraced in the findings of fact. (Rec., pp. 34 to 40, inclusive.)

The testimony submitted in this case by the appellants in the court below consisted of nine affidavits, a number of letters, and reports of the Interior Department and committees of Congress, and the question of their admissibility as evidence was thoroughly considered during the four days' argument of the case, and finally rejected by the court of claims as incompetent.

Appellants contended that the affidavits were competent evidence because they were contained in a report to Congress and embodied in an executive document, and that under the language used in the jurisdictional act the reports and affidavits became evidence. The language used is as follows:

The reports made to Congress on any of said claims by any department of the Government and printed as congressional documents shall be received as evidence in said suit, so far as the facts therein may be concerned, and shall be given such weight as the court may determine for them.

Mr. Belt, who was the attorney for the appellants in the court below, for a number of years, while these claims were pending in the Department of the Interior, was Assistant Commissioner of Indian Affairs, and admitted during the trial of the case that most, if not all, of the reports of committees of Congress had been prepared by himself.

The character of testimony submitted by the appellants appears to have been in the mind of Mr. Platt, of Connecticut, chairman of the Committee on Indian Affairs of the Senate, in speaking of this class of cases, to which we refer upon the authority of the case of *Binns v. The United States* (194 U. S., 486-496):

I do not speak of this claim, but of claims against the Government, and I speak more especially now with regard to what are known as Indian claims. These claims are worked up by attorneys, who, I fear, with the aid of people in the departments who have knowledge of Indian affairs and of treaties, come to the conclusion that possibly they may get something through the Court of Claims in favor of an Indian tribe. So they work up claims which the Indian tribes very often have never heard of, get a contract of 5, 10, and 15 per cent, and then come to Congress and ask that the claim may be referred to the Court of Claims for adjudication.

That is a very plausible request to make, and the Senate has very little time to consider whether it is a claim which is really of consequence enough and which has enough behind it to send it to the Court of Claims. So the matter goes upon request. Then an *ex parte* statement, which has been carefully and skillfully prepared by the attorneys, is submitted to the Court of Claims. (57th Cong., 1st sess., vol. 35, pt. 6, pp. 6261-6262.)

The court below refused to incorporate the incompetent matter submitted and gave its reasons very clearly in the following language:

In the case at bar it was stipulated by and between the attorneys for the claimant and defendant Indians that certain affidavits of the Iowa band might be read as evidence in the trial of this cause, but the United States, who are a party to the suit, by their attorney, refused to sign said stipulation, and are therefore not bound by it. But even if all the parties to the suit had agreed to the proposed stipulation, the court would not be bound thereby. Counsel can not, by stipulation or otherwise, require a court to admit testimony which, under legal rules, is not admissible as evidence in a case. Hence said *ex parte* affidavits, even though they may be printed in the report of a congressional committee, can not properly be admitted as testimony in this litigation. (Rec., p. 43.)

The Court of Claims followed the rule laid down in *Jones and Laughlins v. The United States* (42 C. Cls., 178), where it said, at page 184:

The stipulation can not be admitted so as to dispense with proof which the court deems material. *Ex parte* affidavits relating to matters more properly appearing by deposition can not be substituted despite the stipulation.

The attorneys for the defendant Indians stipulated that the affidavits might be used as evidence. (Rec., p. 87.) In fact, they offered two affidavits themselves which were not considered by the Court of Claims. (Rec., pp. 63, 64, 65, 67, 68, 69.) The attorney who represented the United States, on the other hand, refused to agree to the consideration of

any of the affidavits, and protested against the incompetent matter being incorporated in the transcript of record in this case, upon the ground that the court below had the right to determine what *was* and what *was not* evidence. The Court of Claims, however, included the whole record in the transcript. (Rec., pp. 48, 49.)

In the case of the *Sisseton and Wahpeton Indians v. The United States* (208 U. S., 561), a case similar to this, where an accounting was prayed, the attorneys for the Indians attempted to use several public documents which had been submitted to the Court of Claims, and which that court had refused to incorporate in its findings. This court, through Mr. Justice Holmes, said, at page 566:

We may add here that, as we do not go behind the findings of fact (*McClure v. United States*, 116 U. S., 145; *District of Columbia v. Barnes*, 197 U. S., 146, 150), there has been some waste of energy in arguing from public documents of which we are asked to take notice, and that we see no reason to revise the finding that the claimants should be charged with half the total payments of which their share is to be set off.

The appellants contend that if the defendant Indians are not liable in this action, then the Government is responsible for an improper diversion of the funds, while the defendant Indians claim that if the appellants are entitled to recover the recovery should be against the United States. The United States, therefore, is interested in the defense of this

suit and entitled to object to any incompetent, irrelevant, immaterial, or inadmissible testimony offered at the trial thereof.

The appellants have almost entirely ignored the findings of the Court of Claims and obtained their alleged facts from incompetent matter rejected by that court. It would not be absolutely correct to say that they have totally ignored the findings of fact of the lower court, for in several instances they have attacked the reliability of those findings.

Construction of the jurisdictional act.

The jurisdictional act waived the statute of limitations and gave to the court of claims full legal and equitable jurisdiction to hear, determine, and render judgment in "all claims of the Sac and Fox Indians of the Mississippi in Iowa against the Sac and Fox Indians of the Mississippi in Oklahoma and the United States for money claimed to be due them," etc. The United States has been made a party to the suit, not because Congress intended to create any liability against the Government, but in order to comply with the legal requirement that where a suit is brought against a *cestui que trust* the trustee must be joined as one of the parties defendant. The suit in this case relates entirely to the apportionment of the trust fund in the United States Treasury belonging to the Sac and Fox Indians.

In none of their numerous claims has the Iowa branch of the tribe ever alleged fraud in the official acts of the Secretary of the Interior, or that the money

claimed was due them by the United States. Their claim has always been that they, as well as the defendant Indians, were wards of the Government, but that the Government has paid to the defendant Indians more than their *pro rata share* of the tribal funds. This is illustrated by the action of Congress in the payment of the award of \$42,893.25 made by the Secretary of the Interior under the act of March 2, 1895, *supra*, where it was transferred upon the books of the Treasury Department from the tribal funds to the credit of the defendant Indians to the credit of the appellants. (Rec., p. 40.)

The fact that Congress never intended in any event to charge the Government with any part of this claim is clearly shown by House bill 10133, Twenty-ninth Congress, first session, which passed Congress and was vetoed by the President, upon whose recommendation the claim was afterwards referred to the Court of Claims, and which provided that \$100,167.10 should be taken from the fund to the credit of the Sac and Fox Indians of the Mississippi in Oklahoma and transferred to the credit of the Iowa Indians. This bill is not evidence for any purpose, as it was vetoed by the President and rejected by the Court of Claims in its findings; but as the appellants have referred to it in their brief, we believe we are justified in calling the court's attention to this provision.

The appellants have taken the position that the jurisdictional act has given them rights which they did not already possess, and that no defenses can be

made questioning the justice or equity of their claim. To this we reply that Congress, in the jurisdictional act, did not assume to pass upon the justice or the legality of the claims in favor of either party, but simply referred the claims to the Court of Claims for a judicial determination, where any defense, legal or equitable, might be interposed, except the bar of the statute of limitations, which was expressly removed. Nothing is said in the act that would prevent the defendants from setting up the plea of *res judicata* to these claims, upon the ground that they were once presented to a tribunal which had passed upon them, rejecting some and making an allowance upon one for over \$42,000, which was afterwards paid and accepted by the claimants.

The appellants have also taken the position that in view of the language used in the jurisdictional act the court shall consider as conclusive evidence affidavits, letters, and public documents. It is, however, a well settled rule of law that legislatures have no power to determine the weight which shall be given to evidence by courts of law, otherwise they could determine in advance all cases, and this fact was recognized by Congress in the act in question. In this case, while there were many important facts to be established by the claimants, no evidence has been taken under the rules of court. The appellants have relied entirely on affidavits which were embodied in some congressional committee report, evidently under the mistaken impression that be-

cause permission was given to the Court of Claims to consider reports made to Congress, it could also consider affidavits which were made a part of such reports. Such an interpretation of the law is obnoxious to the elementary rules of evidence, and until the material facts are established by competent and sufficient evidence it is impossible to adjudicate the questions involved in the case.

Appellants contend that reference of their claim to the Court of Claims fixed their status or gave them a standing which they did not already possess. The learned justice who delivered the opinion of the court in the case of *Stewart v. The United States* (206 U. S., 185) said:

The passage of the act did not imply any admission that there was anything due the claimant. It simply provided for the presentation of his claim to the court and for a decision on the merits, *without assuming to say that he had any claim of a meritorious nature.* (Italics ours.)

The Court of Claims was clearly of the opinion that in no event could the United States be held liable to reimburse the appellants out of the Treasury. The court said (Rec., p. 42):

The United States have been made a party to the suit in order to comply with the legal requirement that where a suit is brought against a *cestui que trust* the trustee must be joined as one of the defendants, or where a suit is brought against a ward the guardian

must also be made a party. It does not appear that in all of their numerous claims the claimant Indians have anywhere charged fraud in the official acts of the Interior Department, or that the money claimed was due them by the United States. Their contention is that they, as well as the defendant Indians, were wards of the Government, and that its agents had paid to the defendant Indians more than their proper share of certain specified funds due under various treaties between said defendant Indians and the United States. The fact that both Congress and the Indian Office have sought to deal fairly with both branches of this tribe is shown by the claim set out in Senate Document No. 167, Fifty-fourth Congress, first session, wherein the Secretary of the Interior was directed to investigate certain claims of the Iowa band and report his findings thereon. This was done, as set forth in Finding XIII, and the report showed \$42,893.23 to be due from the defendant tribe to the claimant tribe, which amount was promptly allowed by Congress and was passed to the credit of the Iowa band on the books of the Interior Department.

The court below held that the claim as it stood before reference to the Court of Claims had not been changed in any respect by the jurisdictional act, which simply gave claimant Indians a forum in which to maintain such rights as they may possess (*Stewart v. United States*, 206 U. S., 185).

The award of the Secretary of the Interior under the act of March 2, 1895 (28 Stat., 903).

The Secretary of the Interior investigated the claims referred by Congress and found—

As to the first claim, that nothing was due, as the right to payment had been forfeited by the Sac and Fox Indians in Iowa as a result of the abandonment of their reservation in Kansas without the consent of the Government and in defiance of treaty obligations.

As to the second claim, he found that there was nothing due from the annuities paid to the Oklahoma Indians from 1867 to 1894, as the same had been properly and justly apportioned and paid in accordance with the provisions of the treaties and acts of Congress.

As to the third claim, for their proportionate share of the appropriation for the lands ceded under the treaty of 1867, he found that there was due them the sum of \$29,184.38 on account of principal and \$32,832.45 interest thereon at the rate of 5 per cent per annum from July 1, 1873, to December 31, 1895, inclusive, aggregating \$62,016.83, from which was deducted \$19,123.58, already paid to said Indians on account of said claim, leaving a balance of \$42,893.25, which was reported to Congress by the Secretary of the Interior on March 12, 1896, as due to said Indians and was afterwards transferred by Congress on the books of the Treasury Department from the funds of the defendant Indians to the credit of the claimants. (Rec., p. 40.)

Item 4 of the present claim, \$18,500 for annuities due to the chiefs of the Foxes in Iowa from 1862 to 1899, and item 5, for their pro rata share, according to numbers, of the proceeds received from the sale of land under the treaty of 1859, \$58,923.04, were not presented to the Fifty-third Congress nor referred by it to the Secretary of the Interior under the act of March 2, 1895, *supra*.

It would therefore appear that all of these claims come within the well-established rule that where a party has presented his claim to a special tribunal and has accepted the amount awarded, he thereby acquiesces in the decision of the tribunal by which a part of his claim is rejected, as well as the finding in his favor. (*United States v. Adams*, 7 Wall., 463; *United States v. Adams*, 9 Wall., 554; *United States v. Child*, 12 Wall., 232.)

In the case of the *United States v. Clyde* (13 Wall., 35), which followed the decision of the *United States v. Child*, *supra*, the court said:

The Government stood on the order of a superior officer and insisted that this should govern the contract; the claimant insisted the contrary. Under these circumstances the final determination of the latter to take the balance of the account as made out upon the basis contended for by the Government and his giving a receipt in full is clear evidence that he agreed to take that balance in satisfaction of the claim; and this fact, under the circumstances of the case, precludes him from making any further demand.

Whether tribal Indians who have no forum for the settlement of claims until granted by Congress are governed by the rules of law laid down for persons who are *sui juris* is of course to be considered in this connection. However, in the case of the *United States v. The Cherokee Nation* (202 U. S., 101) this court held the Government liable to the Cherokee Nation for the amount stated in the Slade and Bender account, made under the agreement of December 19, 1891, ratified by section 10 of the act of March 3, 1893 (27 Stat., 640).

The plenary power of Congress over Indian tribes.

The Sac and Fox Indians are and always have been tribal Indians residing on reservations set apart for them by the Government.

The Government of the United States, acting through its legislative branch, is the guardian of all the Indians within its limits so long as the tribal relations continue. (*Worcester v. Georgia*, 6 Pet., 515; *Elk v. Wilkins*, 112 U. S., 96; *United States v. Kagama*, 118 U. S., 375; *Choctaw Nation v. United States*, 119 U. S., 1; *Cherokee Nation v. Southern Kan. Ry. Co.*, 135 U. S., 641; *Talton v. Mayes*, 163 U. S., 376; *Roff v. Burney*, 168 U. S., 218; *Stephens v. Cherokee Nation*, 174 U. S., 445; *Jones v. Meehan*, 175 U. S., 1; *Lone Wolf v. Hitchcock*, 187 U. S., 553; *United States v. Rickert*, 188 U. S., 432; *United States v. Winans*, 73 Fed. R., 72; *Winters v. United States*, 207 U. S., 564.)

In the case of the *Cherokee Nation v. Hitchcock* (187 U. S., 294), the court, referring to the case of *Stephens v. Cherokee Nation (supra)*, said:

The plenary power or control by Congress over the Indian tribes and its undoubted power to legislate, as it has done through the act of 1898, directly for the protection of the tribal property, was in that case reaffirmed.

And the opinion closes with the broad statement that—

The power existing in Congress to administer upon and guard the tribal property, and the power being political and administrative in its nature, *the manner of its exercise* is a question within the province of the legislative branch to determine, and is not one for the courts. (Italics ours.)

The case of the *Cherokee Nation v. Hitchcock* followed the way clearly marked out by earlier decisions of this court. In the case of *Elk v. Wilkins (supra)* the court said:

But the question whether any Indian tribes, or members thereof, have become so far advanced in civilization that they should be let out of the state of pupilage and admitted to the privileges and responsibilities of citizenship, is a question to be decided by the nation whose wards they are and whose citizens they seek to become, *and not by each Indian for himself*. (Italics ours.)

In the very important and far-reaching decision in the case of *Lone Wolf v. Hitchcock (supra)*, decided

one month after the case of the *Cherokee Nation v. Hitchcock*, this court said:

Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, *not subject to be controlled by the judicial department of the Government*. Until the year 1871 the policy was pursued of dealing with the Indian tribes by means of treaties, and, of course, *a moral obligation* rested upon Congress to act in good faith in performing the stipulations entered into on its behalf. But, as with treaties made with foreign nations (*Chinese Exclusion case*, 130 U. S., 581, 600), the legislative power might pass laws in conflict with treaties made with the Indians. (*Italics ours.*)

It will be observed that the act of Congress, the validity of which was in question in the Lone Wolf case, provided, in violation of existing treaties with the Indians, by direct legislation for the allotment of their lands, the sale of their surplus lands, and the disposition of the proceeds of such sales, upon the theory that they were wards of the United States. In concluding its opinion the court, upon the authority of *Stephens v. Cherokee Nation* (*supra*), used language which would appear to indicate that there is no limit to the plenary power of Congress over Indian tribes and their property, and the courts of law have no jurisdiction to interfere with its exercise.

We must presume that Congress acted in perfect good faith in the dealing with the

Indians of which complaint is made, and that the legislative branch of the Government exercised its best judgment in the premises. In any event, as Congress possessed full power in the matter, the judiciary can not question or inquire into the enactment of this legislation. If injury was occasioned, which we do not wish to be understood as implying, by the use made by Congress of its power, relief must be sought by an appeal to that body for redress and not to the courts. The legislation in question was constitutional, and the demurrer to the bill was therefore rightly sustained.

Individual members of the tribe have no vested interest in tribal funds.

All of the lands belonging to the Sac and Fox Indians of the Mississippi, whether in Oklahoma or the State of Iowa, are tribal funds held by the United States for the benefit of the tribe.

The appellants in this case contend that their proportion of the annuities and other tribal funds is a vested right of which they can not be deprived under the fifth amendment to the Constitution of the United States, which provides that "no person shall be deprived of life, liberty, or property without due process of law." They do not appear to have taken into consideration the difference in status between tribal Indians and persons who are *sui juris*, and that different rights of property obtain when considering legislation relating to the Indian wards of the Government.

In the case of *Stephens v. The Cherokee Nation* (174 U. S., 445), where certain applicants in the Cherokee Nation had been finally denied citizenship, and in the other nations admitted to citizenship under the act of June 10, 1896, this court said:

The mere expectation of a share in the public lands and moneys of these tribes, if hereafter distributed, if the applicants are admitted to citizenship, can not be held to amount to such an absolute right of property that the original cause of action, which is citizenship, is placed by the judgment of a lower court beyond the power of reorganization by a higher court, though subsequently authorized by general law to exercise jurisdiction.

And it was further held in the same opinion:

The lands and moneys of these tribes are public lands and public moneys, and are not held in individual ownership, and the assertion by any particular applicant that his right therein is so vested as to preclude inquiry into his status involved a contradiction in terms.

In the case of *Wallace v. Adams* (143 Fed. Rep., 716) the defendant was admitted to citizenship in the Choctaw Nation by the United States court under the act of June 10, 1896, and by the Supreme Court upon appeal. The Atoka agreement providing for the allotment of lands of the Choctaw and Chickasaw nations, entered into April 23, 1907, was ratified by Congress June 28, 1898 (30 Stat., 495). Practically

the only contention of the defendant was that he had been finally enrolled as a citizen of the Choctaw Nation; that he had taken possession of and improved a farm upon the public domain, *and that his right to the land became vested when the allotment agreement was ratified by Congress June 28, 1898.*

On the question of vested rights the court said:

But none of the authorities cited contains a decision that one has a vested right in the judgment of citizenship which the legislative department of the United States may not lawfully disturb, although one of the ultimate consequences of such a judgment, if undisturbed, might be an interest in land and other property.

This court upon appeal (204 U. S., 415) sustained the decision of the Circuit Court of Appeals and quoted at length with approval its former decision in the Stephens case, *supra* (*Roff v. Burney*, 168 U. S., 218).

Citizenship of Indians does not change status of tribal property.

The Sac and Fox Indians of the Mississippi in the Indian Territory were tribal Indians, without any of the rights of citizenship, until the act of March 3, 1901 (31 Stat., 1447), amending the act of February 8, 1887 (24 Stat., 390), provided that—

Every Indian in the Indian Territory is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges and immunities of such citizens.

The Sac and Fox Indians of the Mississippi in Iowa always have been and still are tribal Indians, without any of the rights of citizenship.

The citizenship of the Sac and Fox Indians in Oklahoma since March 3, 1901, is immaterial, for so long as their tribal relations continue the power of the Government over the disposition of the tribal property remains unaffected.

In the case of *Farrell v. The United States* (110 Fed. Rep., 942) the court said:

It is the settled rule of the judicial department of the Government, in ascertaining the relations of Indian tribes and their members to the nation, to follow the action of the legislative and executive departments, to which the determination of these questions has been especially intrusted. (*United States v. Holliday*, 3 Wall., 407; *United States v. Earl*, 17 Fed. Rep., 75, 78.)

In the case of *United States v. Rickert* (188 U. S., 432) the court used the following language:

It is said that the State has conferred upon these Indians the right of suffrage and other rights that ordinarily belong only to citizens, and that they ought, therefore, to share the burdens of government like other people who enjoy such rights. These are considerations to be addressed to Congress. It is for the legislative branch of the Government to say when these Indians shall cease to be dependent and assume the responsibilities attaching to citizenship. This is a political question which the courts may not determine.

In the case of the *Cherokee Nation v. Hitchcock* (187 U. S., 294) the court said:

There is no question in this case as to the taking of property; the authority which it is proposed to exercise by virtue of the act of 1898 has relation merely to the control and development of the tribal property *which still remained subject to the administrative control of the Government, even though the members of the tribe had been invested with the status of citizenship under recent legislation.* (Italics ours.)

Item 1 of the claim.

The first item of the claim made by the Sac and Fox Indians of Iowa is for their pro rata share, according to numbers, of the annuities of the Sac and Fox tribe of the Mississippi from 1855 to 1866, inclusive.

The Sac and Fox Indians of the Mississippi, as already set out in the statement of the case, were removed from Iowa in 1845 and 1846, under the treaty of 1842, to the Territory of Kansas, and remained there drawing their annuities until the early part of the year 1855, when certain members of the tribe, their number, ages, and sex not shown by competent evidence, deserted their reservation and, without authority from the agent or any other government official, returned to their old reservation in Iowa and finally settled in Tama County upon 3,000 acres of land purchased with the annuities which they had already received. The following year the legislature of Iowa passed an act granting permission to those who had returned up to that time to remain

in the State as long as they continued peaceful. The sheriff of the county was directed to take a census of the Indians, which does not appear to have been done.

In 1862 other members of the band deserted their reservation in Kansas, without permission of the agent or any other United States official, and joined those members of the tribe already in Iowa, and from that time until 1867, at various times, other members of the tribe returned to Iowa under the same circumstances.

There is no competent evidence to establish the number of Indians who left the reservation in Kansas and returned to Iowa from 1854 to 1867, nor as to their names, sex, and ages. (Rec., p. 35.)

Without doubt all of those members of the tribe who left Kansas and returned to Iowa received their shares of the annuities at the last payments made before they left. Whether any of them ever returned to Kansas and received their annuities with the tribe is not shown by competent evidence (Rec., p. 37), but from general knowledge of the wandering propensities of Indians it may be presumed that many of them did, for one of the Iowa Indians, Black-feather, as late as 1895, was sent to the penitentiary for presenting for enrollment a child already enrolled among the Sac and Fox Indians of Oklahoma, and for obtaining its annuity for two years (Report of Commissioner of Indian Affairs, 1898, p. 167). The court, in its opinion, however, says:

It is not shown how many of these Indians returned to Kansas during that period to receive their annuities, nor are their names given; but it does appear that some of them did return for that purpose. (Rec., p. 413.)

In order to protect the settlers around the Indian reservations, and for that matter to protect the Indians themselves, it has always been, up to the last few years, the custom and policy of the Government not to pay to or reserve annuities for Indians who were absent from the reservations without permission. A practice, the wisdom of which can not be questioned. (Rec., p. 43.)

During the whole period from 1855 to 1866 there was no agent with the members of the tribe in Iowa, nor were they recognized in any manner by the Commissioner of Indian Affairs, and no money was paid to them as a band until Special Agent Leander Clark took a census on May 31, 1866, and found 264, for whom he expended \$5,359.06, on account of annuities for the year 1865.

If the appellants have any just rights upon this item of their claim the court is barred from the proper consideration of it for want of competent testimony. (Rec., p. 43.)

It was the plain and unqualified duty of the Indians who had wandered from their reservation in Kansas to return to the agency before the date of the annual payments, and see that their names were enrolled for their *per capita* shares of the annuities. The treaties under which those annuities became due all

provided that the money should be paid to the Sac and Fox tribe of Indians, and the Government in all its treaties under which these annuities became due recognized the defendant Indians only. As was said by Judge Weldon in *Blackfeather v. The United States* (37 C. Cls., 233), afterwards affirmed by this court (190 U. S., 368):

The United States, as guardian of the Indians, deal with the nation, tribe, or band, and have never, so far as is known to the court, entered into contracts, either expressed or implied, compacts, or treaties with individual Indians so as to embrace within the purview of such contract or undertaking the personal rights of individual Indians.

In the case of the *Eastern Band of Cherokees v. The United States* (20 C. Cls., 449; 117 U. S., 288) it was held that—

Cherokees who remained east of the Mississippi River after the removal of the nation thereby severed their connection with the Cherokee Nation, were not made parties to the Cherokee treaty of 1846, do not form a nation, and are not entitled to participate in the benefits of the fund held by the United States in trust for the whole Cherokee people.

In the case of the *Chickasaw Nation v. The United States* (22 C. Cls., 222), where a suit was brought by the nation to recover money belonging to certain orphans of the tribe which had been paid to persons who failed to pay it over to the beneficiaries, the

court said, "but a small portion of the money ever in fact reached the orphans." * * *

We have no doubt that the orphans were imposed upon and parted with their rights improvidently, but following the line of argument already marked out, we can not hold the United States liable for their sufferings or hardships. The wards of the nation were not the individuals, Im-mi-ah-ho-ka, Viney, or Puck-sha-nubby, but the Chickasaw Nation (p. 264).

This court, in the case of the *United States v. Blackfeather* (155 U. S., 180-196), held that:

The United States is not liable to the Shawnees for moneys paid under a treaty to guardians of orphans of the tribe, appointed by the tribal council, who had embezzled the money when so paid.

In the case of *Journeycake v. The Cherokee Nation* (31 C. Cls., 140) the court held that the Cherokee freedmen who failed to return in accordance with the requirements of the treaty of 1866 were not entitled to share in the distribution of the communal fund.

In the most recent case upon this subject, *Pam-to-pee v. The United States* (187 U. S., 371-401), there were, according to the findings of the Court of Claims, 272 Pottawatomie Indians who should have been placed upon the census roll and were entitled to share in the payments, but not having presented themselves and caused their names to be placed upon

the roll, were not entitled to recover either from the tribe or the United States. "It must be assumed in the absence of any showing to the contrary that the officers of the Government acted reasonably, fairly, and with all needed diligence in discharging the duty imposed upon them." In its opinion the court further said:

This is not an ordinary judgment at law in which the plaintiff entitled to receive and the defendant bound to pay are both named, and in which the absolute duty is cast upon the defendant to see that the right party is paid, but a case in which the amount of a fund for distribution was determined and directions made for ascertaining the beneficiaries of that fund. The debtor and the beneficiaries were each interested in the question of identification, and both bound by the conclusion reached in respect thereto if the directions were fully complied with.

To what would any other ruling result? The finding which, evidently, from the opinion of Chief Justice Nott was not very clearly established, that 272, in addition to those already paid, were entitled to a part of the fund, does not conclude other claimants, and if these petitioners should obtain a judgment against the United States other petitioners might come forward with like claim, and so the Government be compelled to pay over and over again, although it had made one payment in compliance with the directions of the court. Further, if there were really more beneficiaries entitled to share in this fund than

those who actually received payment, those who were paid received each too much and should return the surplus; and the amount of that surplus would be consistently increased as in successive actions there were added further beneficiaries, for the distribution was, as stated, per capita—a mode of distribution contended for by the petitioners. Petitioners seem to assume that, although the Government took the course prescribed by the court in ascertaining the individuals entitled to share in that fund, it assumed all the risk of mistake, however made, and that they could wait until after the Government had acted and made the distribution, and that no responsibility rested upon them to furnish evidences of their title. For reasons stated we can not assent to this view (pp. 379, 380).

The Court of Claims in rejecting this item said (Rec., pp. 43, 44):

Moreover, as these Indians had voluntarily and without the consent of the United States, withdrawn themselves from the reservation which had been provided for them by the Government they were no longer a legal entity; they were simply individual Indians who had willfully separated themselves from their tribe. The jurisdictional act, however, gives them a forum in which to maintain such rights as they may possess. (*Stewart v. The United States*, 206 U. S., 185.)

It has been the custom and policy of the Government not to pay to or reserve annuities for Indians who are absent from their res-

ervation without permission, and the wisdom and force of this practice can not be controverted. It was held by this court in the *Blackfeather case* (37 C. Cls., 233, 241), which was affirmed by the Supreme Court (190 U. S., 368), that "The United States, as the guardian of the Indians, deal with the nation, tribe, or band, and have never, so far as is known to the court, entered into contracts, either express or implied, compacts, or treaties with individual Indians, so as to embrace within the purview of such contract or undertaking the personal rights of individual Indians."

It is clear that inasmuch as the claimant Indians had voluntarily left the Kansas reservation provided by the Secretary of the Interior for the habitat of the tribe, it was their plain and unqualified duty to return to the agency (which it appears that some of them did) prior to the dates of the annual payments and see that their names were enrolled for their individual shares of the annuities, because they must have known that the treaties which provided said funds required payment to be made to the Sac and Fox tribe at their established agency, and not elsewhere.

In the *Journeycake case* (31 C. Cls., 140) it was decided by this court that all Cherokee freedmen who had abandoned their reservation and failed to return were entitled to no part of the tribal funds; and in the more recent case of *Pam-to-pee v. The United States* (187 U. S., 371) the same principle is clearly laid down. The trend of the decisions of this court, and of the Supreme Court as well, in

this class of cases is to the effect that it is the duty of the Government to recognize tribes and not individual Indians in paying out annuities or other funds due to its Indian wards.

Considering all the facts which rightfully belong to this particular claim, the different treaties, the laws of Congress, the rulings of the Interior Department, and the decisions of the courts, we can not do otherwise than decide that no allowance can be made to claimants thereon.

Item 2 of the claim.

The second item of the claim is closely related to the first. It is for an alleged balance of annuities claimed to have been withheld from the appellants and paid to the defendant Indians from 1867 to 1899, inclusive.

By article 2 of the treaty of February 18, 1867, *supra*, all of the absent members of the tribe were invited to return and permanently unite with the tribe and participate in the advantages of the treaty. The treaty provided, however:

That no part of the funds arising from or due the nation under this or previous treaty stipulations shall be paid to any bands or parts of bands who do not permanently reside on the reservation set apart to them by the Government in the Indian Territory, as provided in this treaty, except those residing in the State of Iowa; and it is further agreed that all money accruing from this or former treaties, now due or to become due said na-

tion, shall be paid them *on their reservation in Kansas*; and after their removal, as provided in this treaty, payments shall be made *at their agency* on their lands as then located.

Congress, however, by an item inserted in the Indian appropriation act of March 2, 1867 (14 Stat., 507), modified this provision of the treaty of 1867, in so far as it related to the absentee members of the tribe in the State of Iowa, and for the first time recognized the existence and right of the Iowa Indians to participate *as a band* in the annuities of the Sac and Fox tribe, and to be paid in Iowa. The item reads as follows:

For interest on eight hundred thousand dollars, at five per centum, per second article, treaty eleventh October, eighteen hundred and forty-two, forty thousand dollars: *Provided*, That the band of Sacs and Foxes of the Mississippi now in Tama County, Iowa, shall be paid pro rata, according to their numbers, of the annuities, so long as they are peaceful and have the assent of the government of Iowa to reside in that State.

The act, according to a well-recognized rule of statutory construction, must be regarded as prospective. It must further be regarded as an indorsement and ratification of the manner in which the annuities prior to its passage had been disbursed; otherwise the act would have made provision for the payment of accumulated annuities to the Iowa Indians.

The first annuity payment to the Sac and Fox Indians in Iowa under the treaty of February 18, 1867, and act of March 2, 1867, was made in the early part of that year, and the *pro rata* share, according to numbers, was \$11,174.66, and payments were made to them at the same rate up to and including the fiscal year 1884. The numbers upon which the annuities were apportioned do not appear.

The Iowa Indians protested against the amount of their annuity and refused to accept it until Congress inserted a provision in the Indian appropriation act of May 17, 1882 (22 Stat., 78), which, after appropriating \$51,000 for annuities in three different amounts, provided:

That the sum of one thousand five hundred dollars of this amount shall be used for the pay of a physician and for purchase of medicine; in all, fifty-one thousand dollars: *And provided further*, That hereafter the Sacs and Foxes of Iowa shall have apportioned to them from appropriations for fulfilling the stipulations of said treaties no greater sum thereof than that heretofore set apart for them.

This provision of the act of 1882 was enacted for the express purpose of ratifying and confirming the apportionment of the annuities of the tribe up to that date. It would be absurd to contend that because Congress *prohibited larger payments after* May 17, 1882, the appellant Indians were entitled to *larger payments before* that date. There can be no question as to the motive which actuated Congress in

passing this act. The Iowa Indians were dissatisfied with the amount apportioned to them and refused to receive it. Congress determined to let them know that they would get no greater sum by waiting. After the passage of the act they appeared to have realized that fact and accepted their annuities. (Rec., p. 38.)

The act of 1882 was also intended to ratify and confirm the payment of \$1,500 for the support of a physician and the purchase of medicines provided under article 10 of the treaty of 1867, *supra*. This amount was allowed for five years under that treaty. All of which was paid to the tribe proper in Kansas and Oklahoma as provided, but was continued up to 1882 without express authority of law. (Finding 12; Rec., p. 39.) The act of 1882 provided, however, that this amount should be continued and paid in the future, as in the past, *to the tribe proper*, because otherwise a part of it paid to the Iowa Indians *would have increased their annuities* which was prohibited by the act.

There was also deducted from the sum of \$51,000 annuities, from 1885, before apportionment between the two branches of the tribe, \$10,000 under article 9 of the treaty of 1867, *supra*, of which \$5,000 was for school purposes and \$5,000 for the support of the tribal government. (Rec., p. 39.) The propriety of this course will be recognized when it is remembered that all of the treaties were made with the tribe proper, which moved from Iowa to Kansas and from Kansas to Oklahoma; and all of the acts of Congress affecting

their tribal property have dealt directly with the tribe proper, and only incidently with the band in Iowa. The act of 1882 ratified this course of the Secretary of the Interior, as well as the payment of the annuities.

Payments were therefore made, as already stated, for the years 1882, 1883, and 1884 at the same rate as had been paid before that time to the Iowa Indians.

After the Iowa Indians had consented to receive their accumulated annuities, and had actually received three additional annual installments, Congress inserted another provision in the Indian appropriation act of July 4, 1884 (23 Stats., 85), where it provided:

That hereafter the Sacs and Foxes of Iowa shall have apportioned to them, from appropriations for fulfilling the stipulations of said treaties, their per capita proportion of the amount appropriated in this act, subject to provisions of treaties with said tribes; but this shall apply only to the Sacs and Foxes now in Iowa: *And provided further*, That this shall apply only to original Sacs and Foxes now in Iowa, to be ascertained by the Secretary of the Interior.

Under this act declared *prospective* by the word *hereafter* therein used the Secretary of the Interior caused a census of the original Sac and Fox Indians in Iowa to be taken, and ascertained that there were 317 of them; and from that time, including the fiscal year 1885, they were paid upon that basis for the Iowa band and 513 for the Oklahoma band, except

for the years 1885 and 1886, when the basis for the defendant Indians was 505.

By the terms of the act the Secretary of the Interior was vested with discretion to ascertain the number of original Sac and Fox Indians as a basis for the apportionment of their annuity *in the future*. Having exercised that discretion it is not within the jurisdiction of the courts to review his action. The roll made by him of the Sac and Fox Indians in Iowa is not subject to correction by the courts.

In the recent case of *Kimberlin v. Commission to the Five Civilized Tribes* (104 Fed. R., 653), construing section 21 of the act of June 28, 1898 (30 Stat., 495), which delegated authority to the Dawes Commission to make up the Cherokee tribal roll, Judge Sanborn said:

Under these acts of Congress the Commission to the Five Civilized Tribes is a special tribunal, vested with judicial power to hear and determine the claims of all applicants to citizenship in the Five Tribes, and its enrollment or refusal to enroll the applicant in each particular case constitutes its judgment in that cause. In the case before us this tribunal has heard and determined the claim of the plaintiff. Whether its decision was right or wrong is immaterial in this court, and that question will not be considered. Congress saw fit to intrust to the judicial discretion of the commission the determination of the application of the plaintiff in error, and of every question of law and of fact which that decision involved. Under the settled

rules to which attention was called in the opening of this opinion, no court has jurisdiction by the use of the writ of mandamus to substitute its own opinion for that of the tribunal to which the law intrusted the decision of these questions, to control the judicial discretion of that tribunal, to correct its errors, or to reverse its decision. The judgments of the courts below were right, and they are affirmed (pp. 662, 663).

In the case of *Fleming v. McCurtain* (215 U. S., 56) certain individual members of the Choctaw Nation, who had been refused enrollment by the Commission to the Five Civilized Tribes, claimed that they had a vested interest in the Choctaw tribal lands and funds under the provisions of the treaty of September 27, 1830 (7 Stat., 333), and the terms of the patent issued thereunder, which conveyed certain lands described therein to the Choctaw Nation in fee simple to them and their descendants, to inure to them while they should exist as a nation and live thereon. This court held that the lands and funds of the Choctaw Nation were communal lands and funds to which no individual member of the nation had a vested right, but that his participation therein was dependent upon his being alive and upon the Choctaw rolls as a member of the tribe at the time of the dissolution of the tribal government and allotment of the tribal lands and distribution of the tribal funds; and the court refused to review the action of the Dawes Commission in refusing to enroll the individual members of the tribe.

Even if the Secretary of the Interior had not been vested with discretion by the act of 1884, his construction of the treaties and acts of Congress would have been entitled to great respect by the courts, and should not be overruled without cogent reasons.

The case of *Brown v. The United States* (113 U. S., 560) is one of the leading cases upon the subject of contemporaneous and uniform interpretation of the laws by government officials. In the case of *Hewitt v. Schultz* (180 U. S., 139), this court held that the continuous contemporaneous construction of the Secretaries of the Interior of the Northern Pacific Railroad act of 1864 was controlling. (See also *United States v. Healey*, 160 U. S., 136; and *United States v. Sweet*, 189 U. S., 471.)

The Court of Claims, in rejecting this item of the claim, said (Rec., pp. 44, 45):

The treaty of 1867 provided that thereafter the claimants should share, in proportion to their population, in the annuities allotted to the Sac and Fox tribe, and they were paid their proportion according to an enumeration of the tribe taken at that time, and were so paid annually until 1885. The defendants contend that there can be no relief accorded claimants under this claim for annuities paid prior to 1884, because Congress has stamped with its approval all such annuity payments; nor can there be a recovery for payments made since that date, because the money so paid has been disbursed strictly in accordance with the express provisions of a law enacted in that

year, which gave the Secretary of the Interior discretionary powers in making the roll. (*Kimberlin v. Commissioners to the Five Civilized Tribes*, 104 Fed. R., 653.) Besides, the findings are not of a character upon which a judgment could be predicated, even though the legal principles for which claimants contend were well founded.

Under article 6 of the treaty of 1859 (15 Stats., 467) the President and the Congress were given absolute authority to establish a new basis for the distribution of the tribal funds of the Sac and Fox Nation. In the act of May 17, 1882 (22 Stats., 78), it was provided "That hereafter the Sacs and Foxes of Iowa shall have apportioned to them from appropriations for fulfilling the stipulations of said treaties no greater sum thereof than that heretofore set apart for them." And the act of July 4, 1884 (23 Stats., 85), further provided "That hereafter the Sacs and Foxes of Iowa shall have apportioned to them, from appropriations for fulfilling the stipulations of said treaties, their *per capita* proportion of the amount appropriated in this act, subject to the provisions of treaties with said tribes; but this shall apply only to the Sacs and Foxes now in Iowa: *And provided further*, That this shall apply only to original Sacs and Foxes now in Iowa to be ascertained by the Secretary of the Interior."

Thus it appears that from 1882 to 1885 there could not be paid to claimant band of Indians a greater sum of money annually than they had received prior to that time, which may be construed as a legislative approval of the

manner in which the fund had been distributed previous to that date.

Under the act of 1884, *supra*, the Secretary of the Interior caused a census of the original Sacs and Foxes in Iowa to be taken, which showed their population to be 317, and from that time, including the year 1885, they were paid upon the basis thus determined.

All the facts deducible from the admissible testimony bearing upon this particular claim are carefully set out in the findings. Under the act of March 2, 1895 (28 Stats., 876-903), the Congress directed the Secretary of the Interior to examine the claims of the claimant Indians, and ascertain whether under treaties or acts of Congress any amount is justly due them as a part of the Sac and Fox tribe of Indians of the Mississippi. In pursuance of said act the Secretary of the Interior made an investigation of all of the claims of the Iowa band, as set forth in their memorial to the Congress, which claims are practically the same as are involved in this suit. The investigation was duly made, and a balance of \$42,893.25, as heretofore stated, was found to be due them, which amount, as shown by Finding XIII, was promptly paid.

Item 3 of the claim.

The third item of the claim made by the Iowa Indians is for their *pro rata* share, according to numbers, of the annuities of the Sac and Fox Indians of the Mississippi from 1900 to 1907, and is but a continuation of the preceding item of the claim. The argu-

ment and facts applicable to the second item of the claim are equally applicable to this, and were so regarded by the Court of Claims in its opinion, where it said (Rec., p. 45):

III. The third item, which is set out in paragraph 13 of the amended petition, avers that claimants are entitled to \$25,788.85 on account of an alleged unequal apportionment of annuities from 1900 to the time the suit was instituted. This claim is simply a continuation of the second. The two claims should have been considered together as one claim for the whole period of both. What we have said under the head of the second item applies with equal force to this one, and consequently no allowance can be made.

Item 4 of the claim.

The fourth item of the claim is for the accumulated annuity of \$500 agreed to be paid by article 4 of the treaty of October 11, 1842, to the principal chiefs of the Sacs and Foxes. The article in question reads as follows:

It is agreed that each of the principal chiefs of the Sacs and Foxes shall hereafter receive the sum of \$500 annually, *out of the annuities payable to the tribe*, to be used and expended by them for such purposes as they may think proper, with the approbation of their agent.

When the Sac and Fox Indians who are residing in Iowa left their reservation without the consent of the Government, it appears that the Fox chief also left the reservation, and that after his departure the \$500

annuity provided by the treaty of 1842 was paid to the Fox chief resident with the tribe in Kansas. This was a proper disbursement of the annuity, because article 9 of the treaty of 1867, *supra*, provides that the annuity of \$500 shall be paid out of the sum of \$5,000 designated by the treaty *for the support of the national government of the tribe*, and was spent *with the approbation of the agent of the tribe*.

This claim is made on the strength of the act of May 31, 1900, *supra*, which directed the Secretary of the Interior—

to pay to Push-e-ten-neke-que, head chief of the Sac and Fox of the Mississippi Indians located in the State of Iowa, five hundred dollars per annum during the remainder of his natural life, *beginning with and including the fiscal year nineteen hundred*, in accordance with the terms of article four of the treaty proclaimed March twenty-third, eighteen hundred and forty-three. (Italics ours.)

This act appears to have been regarded by the appellants as a recognition by Congress of their right to collect back pay for the annuities of the Fox chiefs from 1862 to 1899, inclusive, amounting to \$18,500.

This act, however, was not a recognition of the right of the chiefs of the Iowa band who preceded this chief to back pay, and certainly was not a recognition of *his* legal right to collect it, but rather should be looked upon as an indorsement of the position taken by the department in paying the annuity to the chief of the Fox Indians who remained with his tribe, as it was not granted to him until the death

of the chief elected by the tribe. This construction was given to the act by the Interior Department and should have the same weight as its construction given to the treaties to which we have referred in the preceding claims, and should come within the authorities cited in support of our position as to those claims.

The Court of Claims, in rejecting this item of the claim, said (Rec., pp. 45, 46):

IV. This is a claim for \$500 a year for thirty-seven years' salary of the alleged chief of the claimant Indians. This claim is predicated on article 4 of the treaty of 1842, *supra*, which reads:

"It is agreed that each of the principal chiefs of the Sacs and Foxes shall hereafter receive the sum of five hundred dollars annually, out of the annuities payable to the tribe, to be used and expended by them for such purposes as they may think proper, with the approbation of their agent." (7 Stats., 596.)

This article is an agreement between the United States on the one part, and the tribe on the other, providing that out of the annuities "payable to the tribe" \$500 should be payable to each of the "principal chiefs," but "with the approbation of their agent." Subsequently a portion of the tribe of their own volition separated themselves from the main tribe and were without an agent up to the year 1867. Had an agent in Kansas approved a payment to an alleged chief in the Iowa band, there would even then have been

grave doubt of the legality under this provision to make such payment in view of the separation. If this were allowable, tribes would be rent and there would be no end to the confusion that would follow. While it is true that the act of May 31, 1900 (31 Stats., 245), directed the Secretary of the Interior to pay to the head chief of the Iowa band \$500 salary per year, during the remainder of his natural life, *beginning* with the fiscal year of 1900, yet that does not imply that Congress intended that the chiefs who preceded him should also be paid a like salary, thus making the act retroactive. On the contrary, beginning with the fiscal year 1900, the court is prohibited from going back of that date. Much would have to be read into the act to authorize such procedure, and this we are not authorized to do. This is the construction given to the act by the Secretary of the Interior, and under the authorities we have already cited under the first item of the petition we would not be justified in overruling him. Nor is there anything in the special jurisdictional act controlling or that would justify such action. Hence no allowance can be granted under this claim.

Item 5 of the claim.

The fifth item of the claim is for a proportionate share of the funds derived from the lands ceded by the treaty of October 1, 1859, *supra*.

This claim appears to have been presented in the petition in the Court of Claims for the first time, and

even had the appellants a meritorious claim there would be no way in which the court could arrive at the amount which would be due them. It has already been shown that certain members of the tribe left their reservation in Kansas and went to Iowa in 1855, and that other members of the tribe left the reservation in Kansas at different times from 1862 to 1867 and also went to Iowa, but their numbers, ages, names, and sex have not been shown by competent testimony. (Rec., p. 35.) All of the appellants now in Iowa, so far as the record shows, may have returned to Kansas and had their debts paid under the treaty of 1859, as the treaty provided that all absent members should return and receive the benefits of its provisions, otherwise they would not be entitled. It may be well to call the attention of the court also to the fact that there are no funds in the Treasury derived from the cession of land under this treaty, and never were, the money having been used, according to its terms, in the payment of the debts of the Indians.

The construction placed by the Department of the Interior upon the treaty of 1859 is entitled to the same weight as the construction placed upon the other treaties to which we have called the attention of the court, and we would also call the attention of the court to the same authorities which we have already cited in connection with those cases, and particularly to the Pam-to-pee case, which we think conclusive of this, as well as all of the other claims in question.

The Court of Claims rejected this item of the claim as follows (Rec., pp. 46, 47):

V. The fifth and last item of the claim, which is contained in the fifteenth paragraph of the amended petition, relates to a share in a fund for land disposed of by the Sac and Fox tribe pursuant to the treaty of 1859, *supra*, and interest on the amount which may be found due and payable to the claimant Indians. We can find no line of competent testimony in the record to justify this contention. This claim was never presented to the Interior Department, and even if it were a proper claim against the defendants and was sustained by competent proof, we can see no way by which the court could arrive at the amount which might be due and render a judgment therefor. Furthermore, it is contended by defendant's counsel that there are not now and never were any funds in the Treasury derived from the cession of these lands, the money having been used according to the terms of the treaty in the payment of the debts of the Sac and Fox tribe of Indians. The treaty provided that all Indians absent from the tribe might return and participate in the benefits of its provisions. There is no competent proof in the record to enlighten the court as to the number of Indians who abandoned the tribe from 1855 to 1867, or how many returned during that period and participated in the distribution of the tribal funds, or how many finally returned to the Oklahoma reservation and thereafter became permanent members of the tribe. In the ab-

sence of proof to the contrary, it is only just to assume that those who did not return to the tribe until 1862 shared in the benefits of the treaty of 1859, and as no proper effort has been made by claimants to show who the Indians were that had returned to Iowa prior to 1859; and what, if any, relationship, legal or otherwise, they bear to the claimants in this case, no allowance can be made.

Furthermore, the Supreme Court has decided that there is no vested interest in unallotted tribal lands and undistributed tribal funds. As was said in the case of *Stephens v. The Cherokee Nation* (174 U. S., 445), " * * * the lands and moneys of these tribes are public lands and public moneys, and are not held in individual ownership, and the assertion by any particular applicant that his right therein is so vested as to preclude inquiry into his status involves a contradiction in terms." The same principle was laid down in *Wallace v. Adams* (143 Fed. R., 716), which was subsequently affirmed by the Supreme Court (204 U. S., 415).

From what we have said above there can be no allowance to claimants on this branch of the case.

Under the arguments and facts as stated in this brief we submit that the judgment of the Court of Claims should be affirmed.

JOHN Q. THOMPSON,
Assistant Attorney-General.

GEO. M. ANDERSON,
Attorney.

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Counsel for Parties.

SAC AND FOX INDIANS OF THE MISSISSIPPI IN IOWA *v.* SAC AND FOX INDIANS OF THE MISSISSIPPI IN OKLAHOMA, AND THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 614. Argued December 14, 15, 1910.—Decided April 24, 1911.

The provision in the act of August 30, 1852, c. 103, § 3, 10 Stat. 41, 56, forbidding payment of Indian annuities to any attorney or agent and requiring the same to be paid to the Indians or to the tribe did not give any vested rights to the Indians but was a direction to agents of the United States.

In the Indian treaties under consideration in this case the Government dealt with the tribes and not with individuals, and the treaties gave rights only to the tribes and not to the members.

Under the act of Mar. 1, 1907, c. 2290, 34 Stat. 1055, authorizing this suit, the action is analogous to one at law to recover money paid under mistake of law or fact, rather than one in equity, and this court follows the rule not to go behind the findings of the Court of Claims. *United States v. Old Settlers*, 148 U. S. 427, distinguished.

45 Ct. Cl. 287, affirmed.

THE facts, which involve the determination of the status of Sac and Fox Indians under certain treaties and statutes, are stated in the opinion.

Mr. Charles H. Merillat, with whom *Mr. Charles J. Kappler*, *Mr. George R. Struble*, *Mr. H. F. Stiger* and *Mr. William O. Belt* were on the brief, for appellants.

Mr. Barry Mohun, with whom *Mr. A. R. Serven* and *Mr. R. W. Joyce* were on the brief, for appellee Indians.

Mr. Assistant Attorney General John Q. Thompson, with whom *Mr. George M. Anderson* was on the brief, for the United States.

MR. JUSTICE HOLMES delivered the judgment of the court.

This is a suit brought by the Sac and Fox Indians of the Mississippi in Iowa against the Sacs and Foxes in Oklahoma and against the United States, under the act of March 1, 1907, c. 2290, 34 Stat. 1055. That statute gave "full legal and equitable jurisdiction, without regard to lapse of time," to the Court of Claims to hear and determine "as justice and equity may require, with right of appeal" to this court, all claims of the plaintiffs against the defendants for their alleged "proportionate shares, according to their numbers," not already paid to or for them, of appropriations for fulfilling treaty stipulations, or arising from the disposal or sale of the tribes' lands, including certain claims to be stated. Reports of Departments printed as Congressional documents are made evidence, to "be given such weight as the court may determine for them." The claims made are (1) for annuities between 1855 and 1866, both inclusive; (2) for the difference between the sums paid and those alleged to have been due from 1867 to 1884; (3) for a similar difference from 1884 to date; (4) for a sum alleged to be due for pay of the plaintiffs' chiefs; (5) for the plaintiffs' share of the proceeds of tribal lands disposed of under a treaty of 1859. The case was heard on the evidence furnished by the above mentioned documents, the petition was dismissed, and the plaintiffs took this appeal. 45 Ct. Cl. 287.

The facts found by the Court of Claims, abridged, are as follows. Under the treaty of October 11, 1842, 7 Stat. 596, the tribes in question ceded the land then occupied by them in the Territory of Iowa, were assigned a tract in what now is Kansas, and removed thither in 1845, 1846; then numbering 2278, and, in 1851, 2660 persons. In 1855 and from 1862 to 1866 certain members, number unknown, without permission from the United States, re-

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turned to what had been a part of the Iowa reservation. Their motives are immaterial. On July 15, 1856, the legislature of Iowa passed an act giving the consent of the State that the Indians (Sacs and Foxes) 'now residing' in Tama County, but none others, be permitted to remain there; providing for a census, and requesting the Governor to inform the Secretary of War and urge the payment to such Indians of their proportion of the annuities due or to become due to the tribe. The number of Indians embraced in the act does not appear. From 1855 to 1866 there was no agent of the United States with the Iowa band, although its existence was known. A special agent took a census on May 31, 1866, which gave the whole number as 264 and he spent on account of annuities for them \$5,359.06. Except this sum, all the annuities and other monies of the tribe were paid out at the Sac and Fox agency, Kansas. Whether any Indians returned to Kansas and received payments there does not appear. At this time, up to 1867, annuities were paid subject to the act of August 30, 1852, c. 103, § 3, (10 Stat. 41, 56), which forbade payment to be made to any attorney or agent and required it to be made directly to the Indians themselves or to the tribe per capita, "unless the imperious interest of the Indian or Indians, or some treaty stipulation, shall require the payment to be made otherwise, under the direction of the President." The policy and practice of the Government were to pay no annuities to Indians absent from reservations without leave, as were the Iowa band, and nothing to the contrary is implied by the act of 1852.

We interrupt the recital of facts to dispose at this point of the first claim made by the plaintiffs. The act of 1852 gave no vested rights to individuals. It was not a grant to the Indians but a direction to agents of the United States, subject to other directions from the President. See *Wisconsin & Michigan Ry. Co. v. Powers*, 191 U. S.

379, 387. The Government did not deal with individuals but with tribes. *Blackfeather v. United States*, 190 U. S. 368, 377. See *Fleming v. McCurtain*, 215 U. S. 56. The promises in the treaties under which the annuities were due were promises to the tribes. Treaties of November 3, 1804, 7 Stat. 84; October 21, 1837, 7 Stat. 540; October 11, 1842, 7 Stat. 596. See treaty of October 1, 1859, 15 Stat. 467. So the treaty of February 18, 1867, in article 21, speaks of "the funds arising from or due the nation under this or previous treaty stipulations," and of payments to bands. 15 Stat. 495, 504. Moreover, when the Government decided to pay only at the tribal agency, and then paid the whole amount due, we must presume, at this distance of time, that its decision was made under the direction of the President. The Court of Claims adds as yet a further reason for rejecting this claim that it does not appear how many of the Iowa Indians returned to Kansas to receive their annuities, but (therein varying from the statement of facts found), that it does appear that some of them did. The course of the Government is sanctioned in principle by the implication of the treaty of October 1, 1859, article 7, 15 Stat. 467, 469. That article recites the anxiety of the Sacs and Foxes that all members of the tribes should share the advantages of the treaty, invites non-resident members to come in and provides for notice to them, but adds the condition that those who do not rejoin and permanently reunite with the tribe within one year shall not have the benefit of any of the stipulations in the treaty contained.

On February 18, 1867, another treaty was made, amended September 2, 1868, proclaimed on October 14, 1868, 15 Stat. 495, by which the tribes sold their lands in Kansas to the United States and agreed to remove to a reservation in what now is the State of Oklahoma. Article 21 was like article 7 of the treaty of 1859, just mentioned, with a condition that no part of the funds

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due to the nation under this or previous treaties should be paid to any bands or parts of bands not permanently residing on the reservation, except those residing in Iowa. 15 Stat. 504. The soon following Indian appropriation act of March 2, 1867, c. 173, 14 Stat. 492, 507, provided, as permitted by the treaty of 1859, art. 6, that the band of Sacs and Foxes "now in Tama County, Iowa, shall be paid pro rata, according to their numbers, of the annuities, so long as they are peaceful and have the assent of the government of Iowa to reside in that State." This is subject to the same comment as the act of 1852 when relied upon as a foundation for individual rights under it. From 1867 through 1884, the Iowa Indians were paid \$11,174.66 as their proportion of the annuities, although they protested and for a time refused to receive the same. The matter was settled by a clause in the act of May 17, 1882, c. 163, 22 Stat. 78, "That hereafter the Sacs and Foxes of Iowa shall have apportioned to them from appropriations for fulfilling the stipulations of said treaties no greater sum thereof than that heretofore set apart for them." This by implication ratified the previous estimates and leaves no more to be said as to the second claim—for the time from 1867 to 1884). It is suggested to be sure that the act of 1882 was repealed by the act of 1884, but as will be seen directly it was not repealed so far as it affected this claim. After the act of 1882 the Iowa Indians consented to receive the apportioned sum. We may add that there is nothing to show that all the Indians that had the assent of the government of Iowa given by the act of 1856 to their residing there were not paid their full share.

By the act of July 4, 1884, c. 180, 23 Stat. 76, 85, after an appropriation for interest payable under the treaty of 1842, it was provided that thereafter the Iowa Sacs and Foxes should have apportioned to them, from treaty appropriations, "their per capita proportion of the amount

appropriated in this act, subject to provisions of treaties with said tribes; but this shall apply only to the Sacs and Foxes now in Iowa: *And provided further*, That this shall apply only to original Sacs and Foxes now in Iowa to be ascertained by the Secretary of the Interior." As to the word 'original' we may compare the proviso in the Act of March 2, 1867, stated above. The Secretary of the Interior ascertained the number to be 317 and the number on the Oklahoma reservation to be 505 in 1884 and 513 in 1887. He accordingly apportioned the proper fund in the proportion of 317 to 505 in 1885 and 1886, and afterwards, to 1907, in the proportion of 317 to 513. The plaintiffs attempt to go behind this ascertainment by the Secretary. But here for a third time we are dealing with a statute, not with a treaty. There is no intimation of an intent to change the terms of the treaties by which the contracts were made not with individuals but with the tribes. The statute neither changed nor conferred rights. It simply directed the Secretary of the Interior how the contracts of the United States should be performed. They were performed as directed, to the seeming satisfaction of the representatives of the contractees, and there is an end of the matter. Here again we may add that although it is argued that the evidence shows that the Secretary's estimate was too small for years after 1887, the evidence does not show that the additional Indians were or represented original Sacs and Foxes "now [i. e. on July 4, 1884,] in Iowa." This disposes of the third claim.

However, the Iowa Indians not being satisfied and having presented a memorial to Congress setting up their present claims except that for pay of their chiefs, the act of March 2, 1895, c. 188, 28 Stat. 876, 903, directed the Secretary of the Interior to ascertain whether under any treaties or acts of Congress any amount was justly due to them from the members of the tribe in Oklahoma by reason of any unequal distribution. The Secretary found

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that a certain sum was due from the amount appropriated by act of April 10, 1869, c. 16, 16 Stat. 13, 35, in payment for the Kansas lands ceded by the treaty of 1867, but nothing more. This sum was paid. Act of June 10, 1896 c. 398, 29 Stat. 321, 331.

The fourth claim is based upon article 4 of the treaty of 1842, by which it was agreed that each of the principal chiefs should receive five hundred dollars annually, "out of the annuities payable to the tribe, to be used and expended by them for such purposes as they may think proper, with the approbation of their agent." This like the rest of the treaty was a promise not to the chiefs but to the tribe, gave the chiefs no vested rights and was subject to such qualification in its performance as to the parties might seem fit. Whether a payment to Iowa chiefs would have been performance may be doubted, and certainly if the parties saw fit to treat the chiefs on the reservation as the only ones to be paid, no one else has anything to say. The act of May 31, 1900, c. 598, 31 Stat. 221, 245, directed the Secretary of the Interior to pay a named Iowa head chief five hundred dollars a year, during the remainder of his life, beginning with and including the fiscal year 1900, in accordance with the terms of article 4 of the treaty of 1842, but that is not enough to establish that he had been guilty of mistake in not making the same payment before the time that he was ordered to begin.

The fifth and last claim is for a share in proceeds of land ceded by the treaty of 1859. As to this the Court of Claims finds it impossible to ascertain what sum if any is due or to whom it would be payable. We do not see how the claim can be supported when the treaty itself provided that to benefit by it members must rejoin the tribe, meaning the tribe in Kansas, within one year. It is suggested to be sure that the forfeiture as it is called, was dependent upon notice being given as agreed in article 7, and that there is some evidence that notice was not given. The

condition however was an absolute condition precedent to the acquisition, by persons not parties to the treaty, of any rights, if rights they can be called, notice or no notice; and furthermore if the question were open we should not be prepared to find that there was a failure in that respect. See *United States v. Crusell*, 14 Wall. 1; *United States v. Pugh*, 99 U. S. 265. *New York Indians v. United States*, 170 U. S. 1, has no bearing. There the question was whether grantees in fee simple by treaty had forfeited their rights.

The plaintiffs contend that, as the act authorizing the suit gave the Court of Claims full legal and equitable jurisdiction, the appeal opens the findings of fact for reconsideration, as was held in *United States v. Old Settlers*, 148 U. S. 427, 464, 465. That, however, was a suit in equity, whereas the present case is more analogous to an action at law, to recover a fund from parties to whom it was paid under mistake of law or fact, or from the original contractor by whom the payment was made. We should hesitate to depart from the ordinary rule that we do not go behind the findings of the Court of Claims, *The Sisseton & Wahpeton Indians*, 208 U. S. 561, 566, if, in our view, the question needed to be decided. It is true that the court below stated a principle of evidence that, if it is to be taken literally, cannot be sustained. It said that counsel could not bind the court to admit evidence not admissible by law, and partly on that ground seems to have declined to consider *ex parte* affidavits which the counsel for the Iowa and Oklahoma Indians agreed might be given the effect of depositions. The counsel for the United States refused to agree, and this was a further, and possibly adequate ground for the exclusion, as the agreement may have been understood to be conditional upon all parties joining. But of course evidence, hearsay or *ex parte*, for instance, may be admitted by consent, unless perhaps as against the United States, and then should be given

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whatever weight it would have but for technical rules. Apart from agreement the depositions were not made evidence by the statute of 1907, as that only dealt with reports of Departments, not with every exhibit that such reports might contain.

The question remains whether the error, if error there was, did the plaintiffs any harm. The counsel for the plaintiffs treats the statute giving jurisdiction as intended to open the case from the beginning without regard to inconsistent statutes and to provide for an arbitration on the footing of what may seem fair. See *United States v. Old Settlers*, 148 U. S. 427, 428, 429, 473. *Phineas Park To-Pee v. United States*, 148 U. S. 691, 699. In view of the subject-matter an uneasy doubt is natural whether Congress did not mean rather more than it plainly said. But the jurisdiction given is 'legal and equitable' and the authority is to 'adjudicate as justice and equity shall require' claims for money alleged 'to be due to them as their proportionate shares' of appropriations to fulfill treaty obligations, etc. The statute creates no new right beyond excluding the effect of the lapse of time and, perhaps, the defence of *res judicata* and satisfaction under the acts of 1895 and 1896; it makes no admission, but simply provides for a trial on the merits. See *Stewart v. United States*, 206 U. S. 185, 194. A merely moral claim is not made the foundation of a possible recovery. Something must be shown that amounts to a right.

It is apparent from what we have said that no finding as to the number of Indians in Iowa in particular years, without more, could change the result to which the Court of Claims and this court have come. The treaty contracts on which the plaintiff's claims are founded gave rights only to the tribe, not to the members. It was an accepted and reasonable rule, especially in the days when Indians' wars still were possible and troublesome, that payments to the tribe should be made only at their reservation and

McKENNA, J., dissenting.

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to persons present there. The acts of 1852 and 1867 did not shift the treaty rights from the tribe to the members, create new rights or enlarge old ones. The payments up to 1884 had the sanction of statute. The act of 1884 no more created individual rights than did the acts of 1852 and 1867. It confined its benefits to "original Sacs and Foxes now in Iowa," and made the Secretary of the Interior the judge. There is no evidence to show that he was wrong as to the number of original Sacs and Foxes who had been in Iowa on July 4, 1852. Whether the plaintiffs might get an award in free arbitration, irrespective of treaty and statute, we cannot say, but in our opinion they have failed to establish such rights as can be recognized by this court. The decision below was according to the long established construction and practice of the Department, a fact entitled to much weight in a case like this.

Judgment affirmed.

MR. JUSTICE McKENNA, dissenting.

1. On the supposition that the findings of the Court of Claims are binding on this court, the case should be remanded to that court for further consideration because of its error in refusing to consider evidence made competent by the jurisdictional act and by the stipulation between the contending Indians.

2. If this court may go behind the findings, as I think it may on the authority of *United States v. Old Settlers*, 148 U. S. 464, and as it is conceded by the contending Indians that it may, in my opinion the Secretary of the Interior, in apportioning the annuities from 1885 to date, committed error in taking the fixed, unvarying sum of 317 for the Sacs and Foxes in Iowa, and 505 for those in Oklahoma, disregarding any increase or decrease of the respective divisions of the tribe. The tribal rights of the claimant Indians had been recognized, and the jurisdictional

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act required that they should be given "their proportionate shares according to their numbers . . . of the appropriations made by Congress for fulfilling treaty stipulations with the confederated tribes. . . ."

I think, therefore, that a fixed, unvarying sum should not have been selected. Annual tests should have been made and the increase or decrease of the Indians ascertained by the Secretary of the Interior.

The Court of Claims found, it is true, that there was no competent evidence of the increase or decrease of the divisions of the tribe. But in so finding the court disregarded, as I have already said, evidence which the jurisdictional act and the stipulations of the contending Indians made competent, and such evidence, though not strong, established that the claimant Indians had increased. It is pointed out in the opinion that the Secretary of the Interior recognized a small increase of the defendant Indians in 1887.